85-1188

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

P.B.C.,
PETITIONER,

v.

D.H.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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I

QUESTIONS PRESENTED

1. Has Massachusetts, by denying a natural father the right to establish his paternity, created an impermissible gender-based classification which violates the Equal Protection Clause?

2. Does the Massachusetts rule which bars a natural father from the right to establish his paternity deprive him of due process and present this Court with a substantial federal question of first impression?

3. Have the States which have considered this issue misunderstood the requirements of due process analysis as explicated by *Board of Regents* v. *Roth*?

II

PARTIES BELOW

The parties below are P.B.C.,[1] the plaintiff-petitioner, and D.H., the defendant-respondent. The trial court appointed a guardian *ad litem* for N.H., the child involved in this matter.

[1] The parties and related individuals in this matter will be referred to by initials in order to provide for confidentiality.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Opinion Below

The opinion of the Massachusetts Supreme Judicial Court is reported at 396 Mass. 68 (1985) and appears in the Appendix hereto at A-1.

Jurisdiction

The Order of the Massachusetts Supreme Judicial Court was entered on October 10, 1985. This petition was filed on or before January 8, 1986. This Court's jurisdiction is invoked under 28 U.S.C.A. §1257 (3) (West 1966).

Constitutional Provision Involved

United States Constitution, Amendment 14, Section 1:

> "...No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner is the natural father of a son born to a woman who was legally married to another man at the time of the child's conception. This action originated in the Massachusetts Probate Court where petitioner sought to establish that he was the father of the minor child conceived when the mother was in the process of divorcing her husband and separated from him. Petitioner sought visitation rights and a recognition of legal custody once paternity was established.

Petitioner's detailed, verified complaint, filed on September 6, 1983, set forth the basis for his paternity claim and described his relationship with the infant child. (App. A-22).

Petitioner also asked the court to order blood tests so that he could prove his paternity claim by reliable scientific evidence. (App. A-32). After a hearing on September 27, 1983, the court denied petitioner's request on October 13, 1983 and, after rehearing, again denied the request on November 7, 1983. (App. A-35).

Pursuant to applicable Massachusetts procedures,[1] petitioner then petitioned a single justice of the Massachusetts Appeals Court for relief from the denial of the blood test motion. (App. A-34). On January 3, 1984, Chief Justice Greaney, sitting as a single justice, reversed and ordered that the trial court allow the blood test motion. Chief Justice Greaney

[1] Massachusetts General Laws (hereafter "M.G.L.") c.231, §118.

stated that he "[did] not see any impermissible intrusion on the defendant's constitutional rights by the conduct of the test," but that he did perceive "a potentially serious constitutional problem if the tests [were] not allowed, viz: the deprivation to the petitioner of the most probative, available evidence for maintenance of a significant claim." (App. A-37).

There followed an appeal of the blood test order by the mother. On May 2, 1984, the Appeals Court dismissed the appeal for lack of jurisdiction. (App. A-39).

The mother then petitioned the Supreme Judicial Court for relief from the blood test order pursuant to that Court's general powers of superintendence of lower courts. See M.G.L. c.211, §3.

After a hearing on June 7, 1984 a single justice of the Supreme Judicial Court (Wilkins, J.) declined to exercise the jurisdiction of that Court, and the blood test order remained in effect. (App. A-40).

On June 19, 1984, the trial court allowed the father's motion for blood tests as mandated by the appellate courts and ordered that they be done on the next day. (App. A-44). The mother, however, ignored the trial court's order and failed to appear with the child at the blood testing laboratory.

There followed various motions by petitioner seeking relief from the mother's refusal to comply with the trial court's blood test order. He asked for temporary visitation and the appointment of a *guardian ad litem* for the child to assist in the court's later determination of the extent of visitation which would be in the child's best interests (App. A-45).

On January 2, 1985, the mother moved to dismiss petitioner's complaint for faiiure to state a claim and for lack of standing. The trial court denied the mother's motion to dismiss. Additionally, it ordered that sanctions be imposed on the mother if she continued to disobey the blood test order of June 19th. (App. A-17).

Thereafter, the mother petitioned the single justice of the Appeals Court for relief from the denial of her motion to dismiss. The single justice certified the denial of the motion to dismiss to a panel of the Appeals Court prior to trial. He reasoned that the child might be protected from any harm which might flow from an adjudication of paternity if the court first decided whether or not the petitioner had standing (App. A-9).

Upon certification to the Appeals Court panel, the Supreme Judicial Court ordered direct appellate review on its own initiative, thus bypassing the Appeals Court. On October 10, 1985, the Supreme Judicial Court ruled that the petitioner had no constututional or common law right to have his claim of paternity adjudicated. It held that on the facts of the case, the child was conclusively and irrebuttably presumed to be the issue of the mother's marriage even though she was separated from her husband when the child was conceived and divorced when the child was born. While the Court opined that this presumption would be rebuttable by the mother or her husband, it held that the natural father had no standing to rebut the presumption whatsoever. (App. A-1).

Statement of Facts

The petitioner seeks to adjudicate his paternity and, after a court hearing to determine whether it is in the child's best interests to do so, to resume his relationship with his son.

The petitioner and the mother met in August 1979. They became friends without sexual intimacy at a time when the mother was already experiencing marital difficulties. In May, 1980, the mother separated from her husband. She filed a complaint for divorce from the husband in March of 1981. Sometime after her divorce complaint was filed, the petitioner and the mother commenced a sexual relationship. That relationship continued during the time the child was conceived. (App. A-22). In October, 1981, the mother's physician confirmed that she was pregnant.

On December 8, 1981, the mother, knowing that she was pregnant, appeared in court where a divorce *nisi* was granted.[2] The divorce became final on June 9, 1982. (App. A-28). On June 10, 1982, the mother gave birth. She listed her former husband as the father on the child's birth certificate.

Beginning in July, 1982, when the child was but a few weeks old, the mother began bringing the infant for visits to the petitioner's home. (App. A-28). In August, 1982, the mother told petitioner that he was the child's father. She also requested child support. (App. A-29). Thereafter, and at the mother's suggestion, petitioner and mother jointly attended psychotherapy sessions with a social worker of mutual acquaintance. During these meetings, the mother reaffirmed the petitioner's paternity referring in the presence of the social worker to a specific occasion in September of 1981, which both the petitioner and mother remembered, when she became pregnant. During these meetings, the petitioner acknowledged his paternity and stated his desire to act as the father and to be publicly acknowledged as the child's father. (App. A-29).

Visits between the mother, child and petitioner continued. In January, 1983, the mother asked the petitioner to pay child support of $100.00 per week and expressed her desire to move to a better location with the child. The petitioner agreed to purchase a house for the mother and to pay $400.00 per month toward the mortgage and taxes. In the early months of 1983, the petitioner and the mother began house hunting. The mother located a house she found suitable in Lexington, a suburb of Boston, and the petitioner purchased it. (App. A-30).

In June, 1983, the mother and child moved into the Lexington house. On the day she moved in, the petitioner took care of the infant child. (App. A-30).

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[2] Under Massachusetts' procedure, this is the only divorce hearing. A divorce *nisi* enters upon the court's determination of sufficient grounds. A waiting period follows, and a decree of divorce ***absolute*** or final divorce decree automatically enters six months thereafter.

The petitioner continued to visit his child at the house in Lexington. Frequently, he would drop by to feed the baby, change him, bathe him, and play with him. (App. A-24). Petitioner also took his son to his home. He purchased a crib and high chair for his son and the child stayed overnight on several occasions. (App. A-30). The child recognized the petitioner and appeared happy to see him (App. A-24).

In September, 1983, when the child was one year and three months old, the mother moved out of the house in Lexington, taking the child with her. (App. A-25). She also severed all contact between petitioner and his child.

When she told the petitioner of her decision to move, petitioner asked the mother to confirm his paternity through blood tests and to let him continue to visit with the child. She refused. (App. A-30). Petitioner immediately filed suit in order to regain access to his child (App. A-35). Shortly after the petitioner filed his complaint, the mother remarried her former husband (App. A-17).

The petitioner's son is now three years and six months old. Although there has been no finding that petitioner is unfit to see his child or that the child's best interests would not be served by his having a relationship with his natural father, the petitioner has been barred from seeing his child for more than two years.

Reasons for Granting the Writ

I. THIS CASE PRESENTS IMPORTANT AND NOVEL QUESTIONS REGARDING THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF A FATHER AND HIS SON TO ESTABLISH AND NURTURE A PARENT-CHILD RELATIONSHIP.

A. *Massachusetts' Denial of the Right of a Natural Father to Establish His Paternity Deprives Him of Due Process and Presents a Substantial Federal Question of First Impression.*

Massachusetts, by this case, has created a conclusive presumption preventing a natural father from asserting his paternity in any case where the mother was married at the time of conception. The rule applies regardless of the particular circumstances. The fact that a mother may have been legally separated for many years though still married, or that subsequent to conception, the mother divorces, is rendered irrelevant. More important for this case, the rule applies in spite of the relationship which has developed between the natural father and child and no matter what obligations the natural father has already assumed. Under Massachusetts law, a man who supports, lives with, loves, and nurtures his acknowledged child during the child's formative years cannot establish his paternity even after the mother's death if the mother, though separated, was legally married to another at the time of conception.[3]

In the absence of constitutional recognition, an interest such as fatherhood which is not acknowledged by the State nor the mother cannot exist. Petitioner's right to be a father is dependent on his ability to assert his fatherhood.[4] Given the Mass-

[3] Compare *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

[4] The right to adjudicate paternity is a necessary predicate for ensuring the rights, obligations and responsibilities attendant on fatherhood once paternity is established.

achusetts rule, petitioner must look to constitutional vindication. The jurisdiction of the individual states to terminate the relationship of parents and their natural children is broad but not unbridled. This court has traditionally intervened when the extinction of parental rights contravenes the dictates of the Due Process Clause of the Federal Constitution. "The fundamental liberty interest of natural parents in the care, custody and management of their child" is constitutionally protected. *Santosky* v. *Kramer*, 456 U.S. 745 (1982). See *Lehr* v. *Robertson*, 463 U.S. 248 (1982); *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977).

The threshold inquiry here is whether the nature of petitioner's liberty interests are found within the ambit of the Fourteenth Amendment's protection. *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571 (1972).[5] If his interests are so protected then due process requires that he be accorded the right to be heard "at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

Petitioner's claims present a substantial federal question regarding the reach of the protection provided by the Due Process Clause. This Court has recognized the constitutionally protected right of a natural father to establish and maintain a parental relationship with his child. *Lehr* v. *Robertson*, *supra*; *Santosky* v. *Kramer*, 455 U.S. 745 (1982); *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Quilloin* v. *Walcott*, 434 U.S. 246 (1978); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); See also *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

The fact that the parents in *Stanley*, *Quilloin*, *Caban* and *Lehr*, as here, were not married, did not preclude recognition of the protected interest.[6] Though this Court has acknowledged

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[5] See also *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 839-842 (1977); *Ingraham* v. *Wright*, 430 U.S. 651, 672 (1977); *Lehr*, *Id.*, at 270 (White, J., dissenting).

[6] Though the form of process provided in *Quilloin* and *Lehr* was considered adequate, there was no question that a recognized protectable interest was at issue.

the "considerable difficulty" of defining the concept of "family" for purposes of the Due Process Clause, "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Smith* v. *Organization of Foster Families*, *Id* at 842-3. "The intangible fibres that connect parent and child...are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr*, *Id.*, at 256. In short, "[t]he nature of the interest at stake here is the interest that a natural parent has in his...child, one that has long been recognized and accorded constitutional protection." *Lehr*, *Id.*, at 270 (White, J., dissenting).

In *Lehr* v. *Robertson*, the Court considered the adequacy of New York's pre-adoption notice requirements afforded an unwed father who had not developed a relationship with his daughter. In finding New York's procedure adequate, the Court had the opportunity to examine more closely the nature of parenthood and to define precisely when constitutional protection attaches to that status. There, the Court, quoting Justice Stewart in *Caban*, stated that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Lehr*, *Id.*, at 260, quoting *Caban*, *Id.*, at 397. Rather, the Court required both natural parentage and a showing of commitment to the parent/child relationship. Only where the natural father has come forward to participate in the rearing of the child are his rights entitled to protection by the Fourteenth Amendment:

> "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by '(com[ing] forward to participate in the rearing of his child,)' *Caban*, 441 U.S. 380 at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as

a father toward his children.' But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. '[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship.' *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 231-233 (1972)).

"The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interest lie." *Lehr* v. *Robertson*, *Id.*, at 261-262.

The heart of the due process holding in *Lehr* was that New York had adequately protected the unwed father's *opportunity* to form a relationship with his child. The Court declined to decide whether New York's procedures were adequate where they would result in the termination of a *developed relationship*. *Id.*, at 262.[7] *Lehr* indicates that where an unwed father

[7] Some states have gone to creative extremes to *enhance* this opportunity rather than foreclose it. In *In re Trisha M.*, 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977), the putative father had been prevented from raising the presumption of paternity in himself through the mother's actions. The California Court of Appeals went to the extent of granting custody prior to determining any issue of parentage so that he could complete the conduct necessary to establish himself as the presumed father under the California Uniform Parentage Act. 141 Cal. Rptr. at 560. In *In re Trisha M.*, the necessary conduct was receiving the child into his home and holding her out as his own child.

has demonstrated "a full commitment to the responsibilities of parenthood by coming forward to participate in the raising of his child," he has earned "substantial protection under the Due Process Clause". The Court's reasoning in *Lehr* applies here. Since Massachusetts has foreclosed the natural, participating father from asserting any rights, this Court should carefully scrutinize the State's infringement of his relationship with his son.

Indeed, petitioner's situation is more justly deserving of protection than that described in *Lehr*. It is beyond dispute that he made the "full commitment" contemplated by *Caban* and *Lehr*, taking every available opportunity to support, love and relate to his son. (App. A-29-30). He visited with the child frequently and regularly. (App. A-30). He supported both his son and the mother by purchasing a home for them to live in and contributed monthly to its upkeep. (App. A-29). Petitioner immediately sought an acknowledgement of his paternity from the mother and now seeks acknowledgement from the courts so that he may continue to assume all the obligations, responsibilities and functions of fatherhood. He thus presents a picture far removed from the apparent indifference of the father in *Lehr* who, having established no relationship with his child, took no advantage of the opportunity the State provided and thereby lost the protection he might otherwise have had.[8]

Moreover, unlike *any* case this court has considered involving the constitutional protections afforded unwed fathers, Massachusetts endorses the extinction of parental rights without a hearing of any sort. Unlike formal adoption procedures or other proceedings to terminate parental rights, all of which presuppose some form of hearing, Massachusetts has barred the petitioner from participating in the raising of his child

[8] He also distinguishes himself from a stranger to the marriage who cannot support his claim with a sworn statement supported by substantial evidence of a sexual relationship with mother at a time when mother was separated and later substantial involvement with the child.

without any notice or opportunity to be heard. According to Massachusetts law, there are now no circumstances under which someone like petitioner could be heard. So long as conception occurs while mother is married to another, the natural father is permanently barred from asserting a claim no matter how overwhelming the evidence of his paternity.[9]

This case presents the novel and important question of whether the Due Process Clause affords any protection to a natural father who has developed his relationship as much as humanly possible only to find that the State can thwart his effort and sever his family ties to his child forever without any opportunity to be heard.

B. *The Holding In This Case Demonstrates That Massachusetts And Every Other State Considering The Claim Has Misunderstood The Requirements Of Due Process Analysis As Explicated By* Board Of Regents v. Roth.

Since 1972 due process analysis holds that: "...a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents* v. *Roth*, 408 U.S. 564 at 570-571 (1972) (emphasis in original).[10] "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971). But "[t]he constitutional re-

[9] In this regard, Massachusetts has rejected any consideration regarding the substantiality of the claim. Thus, even if, on the face of the complaint, petitioner could establish a case of paternity "beyond all doubt" he would be barred from adjudicating his claim.

[10] See also *Smith* v. *Organization of Foster Families*, *Id.* at 839-842 (1977); *Ingraham* v. *Wright*, 430 U.S. 651, 672 (1977); *Meacham* v. *Fano*, 427 U.S. 215, 224 (1976); *Goss* v. *Lopez*, 419 U.S. 565, 575-6 (1975); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

quirements of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process." *Board of Regents* v. *Roth*, *supra* at 570, n.8. This Court has consistently separated the question of what interests fall within the Due Process Clause and the question of what process is due. See, e.g., *Annett* v. *Kennedy*, 416 U.S. 134 (1974).

But when State courts have considered the claims of unwed fathers seeking protection under the Due Process Clause, they have uniformly ignored or misconstrued the *Roth* approach. Instead of looking to the nature of the individual interest asserted to determine whether it is entitled to protection in the first instance, they have expressly engaged in a balancing process, a "weighing of the competing private and public interests," in order to determine the existence of a protectable interest. While this analytical approach is permissible once a protectable interest has been shown and where the question is what amount of process is due, it is not proper to apply this analysis in determining whether or not a protected interest exists in the first place. Yet the states have mistakenly applied this analysis regardless of the outcome, and in majority, concurring and dissenting opinions. See *R.M.G. and C.W.* v. *J.W. and W.W.*, 615 P.2d 666 (Colo. Sup. Ct. 1980); ("In order to determine if due process provides the putative father standing to rebut the presumption that the child is the issue of the mother's husband, we must weigh competing private and state interests." Dubofsky, J., specially concurring at 672; "I agree. . . that the competing private and state interests must be weighed in determining whether due process of law requires. . . a hearing. . . ", *Id.* at 677, Lohr, J., dissenting); *In re Lisa R.*, 532 P.2d 123 (Cal. Sup. Ct. 1975) ("The question whether appellant, as one claiming to be Lisa's natural father, can rebut the presumption that Lisa is the issue of her mother's marriage must thus be resolved by weighing the competing private and state interests," majority opinion at 131-132); *A* v.

X, Y and Z, 641 P.2d 1222 (Wyo. Sup. Ct. 1982) ("But, assuming arguendo that A had a constitutionally cognizable interest, competing private and state interests would have to be weighed to determine whether a hearing were necessary to afford due process of the law," majority opinion at 1227); *Michelle W.* v. *Ronald W.*, 703 P.2d 88 (Cal. Sup. Ct. 1985) ("...the issue must be resolved by weighing the competing private and state interests," majority opinion at 91);[11] *Petitioner F.* v. *Respondent R.*, 430 A.2d 1075, 1078 (Del. Sup. Ct. 1981) ("Thus, assuming *arguendo* that the putative father has a constitutionally cognizable interest, that interest would be outweighed by the competing public interest and public policy in this case," majority opinion at 1079); *P.B.C.* v. *D.H.*, 396 Mass. 68 (Mass. 1985) (majority opinion at 73; App. A-1). See also *Vincent B.* v. *Joan R.*, 126 Cal. App.3d 619 (Cal. App. Ct. 1981) (majority opinion at 624).

The erroneous path State courts have taken may be explained by their fundamental misunderstanding of the holding in *Stanley* v. *Illinois*, *supra*. Because *Stanley* involved the claim of an unwed father to a hearing on his fitness before the State could take custody of his children, its general due process language is frequently cited. In *Stanley*, this Court stated:

> "'...what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest affected by governmental action.' *Cafeteria Workers* v. *McElroy*,

[11] Indeed California has determined that an unwed father has no right to adjudicate paternity where a presumed father is present but he has such a right where no such parental figure exists and the child may otherwise become a ward of the state. Compare *In re Lisa R.*, 13 Cal.3d 636 (1975), *cert. denied*, 421 U.S. 1014, *rehg. denied*, 423 U.S. 885 (1975), with *Michelle W.*, *supra*. Thus, in the California view a constitutionally protected interest exists only where the balancing of interests burdens the State.

367 U.S. 886, 895 (1961); *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970).

"The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 650-651.

While the language of *Stanley* has been misconstrued as permitting a "balancing" process between individual private interests and state policies, a fair reading of *Stanley* does not warrant such a conclusion. First, the quotation from *Cafeteria Workers* is this Court's classic statement regarding *what* process is due, not whether there is a protectable interest. Second, the unwed father in *Stanley* undeniably had other state court procedures available to him to adjudicate his claims. Third, the Court was describing the type of balancing process necessary to determine whether the type of procedure provided in any given context passed constitutional muster. It was not considering the threshold inquiry of whether the asserted interest fell within Fourteenth Amendment Protection. Finally, though decided in the same term, *Stanley* preceded *Roth's* watershed holding. The *Stanley* court was moving toward the more objective standard *Roth* enunciated ("nature" of interest) and moving away from the more subjective test ("weight" of the interests).[12] *Stanley* reflects this shift: the Court emphasized the "essential,"[13] "basic"[14] and "precious"[15] interest of "a parent in the companionship, care, custody, and

[12] For example, a public school teacher who receives tenure upon hiring could invoke due process because the *Roth* test is satisfied. Yet, a teacher who has worked for many years under an explicit year-to-year contract possesses no protectable interest and may be dismissed summarily, despite the greater magnitude of loss.

[13] *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), quoted in *Stanley*, *Id.* at 651.

[14] *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), quoted in *Stanley*, *Id.* at 651.

[15] *May* v. *Anderson*, 345 U.S. 528, 533 (1953), quoted in *Stanley*, *Id.* at 651.

management of his . . . children,"[16] even as it permitted the States to employ the more limited due process protections given to less fundamental interests.[17]

In this case, the Supreme Judicial Court of Massachusetts not only erred in applying a balancing test, it erred also in holding that the State had a 'powerful countervailing interest' that justified the complete preclusion of the natural father from paternity adjudications. *Id.* at 73 (App. A-6). The Court's assumption that denial of the right to establish paternity *promotes* Massachusetts' legitimate interests in family life embodies and effects the danger that *Roth* sought to avoid. At the root of the Due Process Clause is the notion that the State's power over individual lives and liberties is limited by the procedural protections of the Due Process Clause. To deny a fundamental Fourteenth Amendment right because it promotes a legitimate State interest is to beg the question, not answer it.

The approach taken in the area of paternal rights by State courts considering the matter is at odds with the analysis this court has mandated. Particularly in the sensitive area of the rights of natural parents and their children, where state law determines the final outcome in the vast majority of cases,[18] there is a substantial need for guidance from this court as to the appropriateness of state court constitutional analysis.

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[16] *Stanley*, *Id.* at 651.

[17] Where the interests were less fundamental, the Court held that the facts of the particular context determine how many of the traditional safeguards should be applied. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894 (1961) and *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970), both quoted in *Stanley*, *Id.* at 650. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 69 (1972) ("the household goods, for which appellants contacted and paid substantial sums, are deserving of [due process] protection"). Indeed, it was the inherent subjectivity of analyzing "the particular facts . . . to determine whether . . . a constitutionally protected liberty interest" exists that formed the basis for the dissent in *Lehr*. *Lehr* v. *Robertson*, *Id.* at 270 (White, J., dissenting).

[18] *Lehr* v. *Robertson*, *supra*; *United States* v. *Yazell*, 382 U.S. 341, 351-353 (1966).

II. By Denying A Natural Father The Right To Establish His Paternity, Massachusetts Has Created An Impermissible Gender-Based Classification That Violates The Equal Protection Clause.

The Massachusetts rule in this case holds that a natural father has no standing to assert his paternity of a child conceived while the mother was married to another man, even where a substantial personal and financial relationship has been developed with the child. This rule applies even though Massachusetts expressly recognizes a natural mother's right, in precisely the same circumstances, to assert her claim of paternity and support.[19] By so doing, Massachusetts has established an impermissible classification burdening natural fathers which deprives petitioner and others like him of the equal protection of the laws. It is a gender-based classification which this court has never had the opportunity to consider.

The Massachusetts Supreme Judicial Court agreed that the petitioner's rights were precluded in a situation in which the parallel rights of the mother would be enforced, but it denied that this rule was gender-based. As evidence of assertedly even-handed treatment of men and women, the Court pointed out that: "Not only mothers, but presumed fathers as well, may initiate proceedings raising the issue of the child's paternity." *Id.* at 74 (App. A-7). But the Supreme Judicial Court's premise is false. The classification at issue is not between males and females or between husbands and wives. Rather it is the

[19] Under Massachusetts law, both the natural mother and the presumed father (i.e., married to the mother at conception or birth) have the right to establish the paternity of another. *Baby X* v. *Misiano*, 373 Mass. 265 (1977); *Symonds* v. *Symonds*, 385 Mass. 540 (1982). See also M.G.L. c. 273,§ 12. *P.B.C.* v. *D.H.* leaves open the question of "whether the child could, at some point, for the purpose of establishing inheritance rights or for any other purpose, bring an action attempting to prove that the [petitioner] is his natural father." (*Id.* at 75; App. A-8). See also *Howell* v. *Kowalski*, 380 Mass. 663 (1980).

classification between *natural* mothers and *natural* fathers that is under attack.

The individuals who are similarly situated in this case must be similarly treated. The presumed father (legal husband) is not similarly situated; he is not a natural parent. His marriage to the mother may have little or nothing to do with the child's welfare and, indeed, may even be inimicable to it. It is the differential treatment of the natural mother who can initiate an action for paternity from the natural father who cannot which petitioner asserts violates the Equal Protection Clause. Moreover, because petitioner took the opportunity to "come forward" and establish the kind of relationship with this child that the Court in *Lehr* deemed constitutionally protected, the "significance of the biological connection"[20] cannot be ignored. Thus, the Massachusetts rule turns the values *Lehr* enunciated on their head: the natural father is denied the opportunity to develop a relationship with his child and that opportunity is *only* available to another male. The result not only differentiates impermissibly and unequally between natural mothers and natural fathers, it eliminates the rights of a natural father altogether without consideration of the child's interest.

This Court has enforced the equal protection claims of natural fathers in a series of cases. *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Stanley* v. *Illinois*, *supra*. Cf. *Lehr* v. *Robertson*, *supra*; *Quilloin* v. *Walcott*, 434 U.S. 246 (1978). The standard for review of asserted discrimination in these circumstances is clear:

> "Gender based distinctions must serve [important] government objectives and must be substantially related to the achievement of these objectives in order to withstand judicial scrutiny under the Equal Protection Clause." *Caban* v. *Mohammed*, *Id.* at 388, quoting from *Craig* v. *Boren*, 429 U.S. 190, 197 (1976).[21]

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[20] *Lehr*, *Id.* at 262.

[21] See also *Reed* v. *Reed*, 404 U.S. 71 (1971).

Here, the interests of the State have been articulated as "legitimate and strong interests in the 'strengthening and encouragement of family life for the protection and care of children' and in affording legitimacy to children." *P.B.C.* v. *D.H.*, 396 Mass. 68 (1985) at 73 (App. A-6).[22] While no one would dispute the validity of these interests and that they are "well within the power of the State to implement,"[23] this classification is not substantially related to these aims and is thus constitutionally infirm.

First, Massachusetts' interest in promoting the family unit is at least diminished where conception and birth indisputably occur at a time when no intact family exists and the mother is a single parent. The conception of the child occurred at a time when the mother, though still married, had been living separate and apart from her husband for some time. She had already commenced proceedings to obtain a divorce. The birth of the child occurred when the mother was in fact divorced, living as a single parent. (App. A-22).

Second, to the extent that the State interest includes protection of the family unit by preventing "[a] challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage" (*Id.* at 74; App. A-7), it is not served by precluding an adjudication of paternity by someone like petitioner. The natural father is not a stranger making a bald assertion of paternity. On the contrary, the record reflects a compelling variety of credible evidence which, coupled with the blood test which has been denied him, would establish petitioner's paternity "beyond all reasonable doubt." *Id.* at 71, quoting *Phillips* v. *Allen*, 2 Allen 453, 454 (1861); (App. A-3). Acknowledgement of petitioner's paternity by the mother, frequent and regular visitation with the child

[22] It is interesting to note that the Supreme Judicial Court's language, in rejecting petitioner's right to adjudicate paternity, is taken from the preamble ("Declaration of policy; purpose") of the Massachusetts statute which gives great deference to the rights and claims of biological parents. See Massachusetts General Laws, Chapter 119,§ 1 (1984 ed.).

[23] *Stanley* v. *Illinois*, *Id.* at 652.

agreed to in advance by the mother, the offer and acceptance of child support, and the purchase of a home by petitioner where mother and child lived, establish both the *bona fides* of the petitioner's claim as well as his substantial efforts to establish, maintain, nurture and develop his relationship with his son.

Third, a natural mother's claim of paternity and support presents precisely the same potential for disruption to the family unit, yet the mother's claim is condoned by the State. As Chief Justice Rose of the Wyoming Supreme Court stated in his dissenting opinion:

> "...the biological mother is permitted to bring an action to disrupt the family unit (consisting of the mother, presumed father and child) in order to declare paternity in another—namely, the biological father (as in a bastardy proceeding) while the biological father is prevented from doing the same, i.e., bringing suit to establish his parent-child relationship, which, perforce, would carry with it the self-same family unit disruption and bastardy ramifications." *A* v. *X,Y and Z*, 641 P.2d 1222, 1231 (Wyo. 1982).

The corollary of the mother's bringing a paternity action is that the natural father will be responsible for support.[24] Thus, the claim serves to take the duties and responsibilities of one father and place them with another, implicitly rejecting the concept of family and creating the issue of stigmatization. Such consequences are permitted the mother, yet when made by the natural father, as a positive assertion in order to *assume* these same duties and responsibilities and to provide the child with benefits such as support and rights of inheritance, the State precludes them.

[24] Such claims can, of course, also be made by the presumed father. See *Symonds* v. *Symonds, supra.*

As the Colorado Supreme Court has stated in a similar context:

> "...[The rule] exemplifies a gender-based classification predicated on an overbroad generalization that a mother has a legitimate interest in establishing a determination of paternity in a non-spousal father, while such father has no interest in establishing a determination of paternity in himself....
> "This statutory scheme creates more than a difference in treatment of natural mothers and fathers. It establishes contrary treatment." *Id.* at 671.

Fourth, Massachusetts' valid interest in "affording legitimacy to children whenever possible" (App. A-6) is of minimum significance in these factual circumstances. Legitimacy as a legal concept establishes the obligation for financial support and the rights of inheritance. Neither issue is in dispute here. The child is presumably supported by the mother's husband and in any case, petitioner has provided support and has been ready, willing and able to continue to do so had the mother, husband or *guardian ad litem* been willing to accept his tender. As for the right of inheritance, the matter has never been raised and it is not ripe for adjudication.[25] What remains of the State's interest in affording legitimacy is its interest in minimizing the potential for social stigma that some would say attaches to one with that status. But in this context, that concern too evaporates on closer examination. The adjudication of paternity necessarily occurs in the context of whether or not the best interests of the child would be served by visitation or other contacts with the child. The issue of stigma is a relevant *factual* consideration in determining the best interests of the

[25] As noted, the State Court expressly declined to express an opinion as to whether this child could sue petitioner for paternity to establish inheritance rights. (App. A-8).

child *after* an adjudication of paternity. Weighed in the balance of the "best interests of the child" formula, the psychological effect of the so-called stigma, if any, may effect the degree of access between father and child. But it may not be used as a matter of social policy to preclude an adjudication in the first place in all circumstances.

Indeed, this Court has held state custody determinations based upon hypothetical stigmatization of the child constitutionally improper. In *Palmore* v. *Sidoti*, ____U.S.____ (1984), 104 S. Ct. 1879, 80 L. Ed.2d 421, this Court held that the possibility of stigmatization due to racial biases and stereotypes was not a legitimate basis for a custody decision where a white mother seeking custody was cohabiting with a black man:

> "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. . . 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held' ", *Palmore* v. *Sidoti*, ____*U.S. at p.*____, 104 S. Ct. at 1882 quoting *Palmer* v. *Thompson*, 403 U.S. 217, 260-61 (1971) (dissenting opinion of White, J.).

The purely private prejudice arising from the status of illegitimacy cannot be accorded consideration in this case as a matter of State policy any more than the supposed "damaging impact on the child from remaining in a racially-mixed household"[26] could be given deference in *Palmore*.[27] See also *Michelle W.* v. *Ronald W.*, 703 P.2d 88 (Cal. Sup. Ct. 1985).

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[26] *Palmore*, *supra* ____U.S.____at p.____, 104 S. Ct. at p. 1881.

[27] A number of states have enacted the "Uniform Parentage Act" (e.g. California, Civ. Code § 7000 et seq., Stats. 1975 ch. 1244, § 11, pp. 3196-3204) which "makes a revolutionary change in the law by abolishing the incidents of illegitimacy and establishing legal equality of children without regard to the marital status of their parents". See *Michelle W.* v. *Ronald W.*, *supra*, where the California Supreme Court expressly rejected the "stigma" of illegitimacy as a basis for constitutional consideration.

Finally, what this Court has stated regarding state legislation is equally applicable to this judicially created State rule: "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liabilities." *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973). To the extent that Massachusetts has a legitimate interest in the stability and sanctity of family life, it is already satisfied by the presumption favoring the mother's husband and by application of the requirement that the presumption may not be rebutted "except on facts which prove, *beyond all reasonable doubt*, that the husband could not have been the father." *PBC* v. *DH*, 396 Mass. 68 (1985) at 71 (App. A-3). All that petitioner seeks here is the opportunity to rebut that presumption. Moreover, Massachusetts need not allow access to its courts on a bare claim of paternity. For example, in furtherance of its legitimate interests, it could require a claimant to establish a prima facie case by sworn affidavit filed with the complaint that there was not an intact family at the time of conception (mother living alone or with claimant), that conception occurred at a time when the claimant was having a sexual relationship with the mother and that, after birth, claimant had established and maintained a meaningful and substantial relationship with the child. Such requirements could not be construed as impermissible. What the Constitution does not permit is Massachusetts' absolute ban on the right to rebut the presumption altogether.[28]

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[28] Thus, this case is not different from those cases that have reached this Court challenging a State's application of an irrebuttable presumption to prevent an individual having an opportunity to assert an important interest: "[W]here the private interests affected are very important, and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Constitution requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices." *United States Department of Agriculture* v. *Murry*, 413 U.S. 508, n.18 at 518 (1973) (Marshall, J., concurring); *Cleveland Board of Education* v. *Lafleur*, 414 U.S. 632 (1974); See also *Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969); *United States* v. *Brown*, 381 U.S. 437, 454, n.29 (1965); *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

The classification Massachusetts has created bears no substantial relation to any important government objective. It denies petitioner both his right to equal protection and to his basic parental rights. The petitioner's claim of gender-based discrimination has not been decided before by this Court. Given the number of conflicting State Court decisions on the question, it is one that this Court ought to resolve.

Conclusion

Petitioner has raised novel and important questions regarding the reach of the Due Process Clause and the application of the Equal Protection Clause to this gender-based classification. To the extent that State courts have adjudicated similar claims, they have done so by uniform misconstruction of this Court's previously explicated analytical framework. For these reasons and because substantial federa questions are presented, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

P.B.C. *vs.* D.H.

Middlesex, May 8, 1985.—October 10, 1985.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & O'CONNOR, JJ.

CIVIL ACTION commenced in the Middlesex Division of the Probate and Family Court Department on September 6, 1983.

A pretrial motion was heard by *Edward M. Ginsburg*, J.

Leave to file an interlocutory appeal was granted in the Appeals Court by *John M. Greaney*, C.J.

The Supreme Judicial Court ordered direct appellate review on its own initiative.

Steven I. Dean for the defendant.

Malcolm M. Donahue for the minor.

Muriel N. Carpenter for the plaintiff.

O'CONNOR, J. The plaintiff in this case contends that he has a right to an adjudication of whether he is the father of a child conceived while the child's mother, the defendant, was married to another man. We hold that in the circumstances of this case he has no such right.

The complaint, filed in the Probate and Family Court, requests that the court declare the plaintiff to be the natural father of the child and that he be granted custody of the child, or, if not custody, then visitation rights. The plaintiff moved that the court order that he, the mother, and the child submit to a Human Leukocyte Antigen (HLA) white blood cell test. A judge denied the motion. Thereafter, there were proceedings in the Appeals Court and before a single justice of this court, as well as further proceedings in the trial court, resulting in the allowance of the plaintiff's motion and an order that the plaintiff, the mother, and the child submit to the test on a specified date.

When the mother and the child failed to submit to the test, a judge of the trial court imposed sanctions by ordering that the mother would be deemed to have made certain concessions favorable to the plaintiff's claim. The plaintiff then moved that the case be scheduled for trial, but, before a trial date was assigned, the mother moved to dismiss the complaint on the ground that the plaintiff lacked standing to litigate the question of his paternity. Taking into account the earlier proceedings relative to the blood test, an affidavit that had been filed by the plaintiff, and certain "undisputed evidence," a judge concluded that allowance of the motion to dismiss at that time was inappropriate, and he denied the motion. At the same time, he ordered the mother and the child to submit to the HLA test. The order provided that the possible consequences of noncompliance would be preclusion of the mother from offering evidence at trial on the issue of paternity, incarceration until she complied with the order, and assessment of "daily costs" against her.

The next procedural step was that the mother filed in the Appeals Court a petition for review of the denial of her motion to dismiss the complaint. A single justice of that court reasoned that if the test were administered and showed that the plaintiff was the child's natural father, and if then, on appeal, it was decided that the plaintiff had no standing to assert his paternity, serious and longlasting emotional damage might unnecessarily be caused to the child. Accordingly the single justice authorized an interlocutory appeal to the Appeals Court from the denial of the mother's motion to dismiss the complaint, and he ordered a stay of further proceedings in the trial court. We transferred the case to this court on our own initiative. We remand the case to the Probate and Family Court for the entry of an order dismissing the complaint.

The trial judge and the single justice of the Appeals Court relied on matters outside the pleadings in making their rulings. The parties, too, in their briefs on appeal, rely on facts not

pleaded. Therefore, we treat the motion to dismiss as a motion for summary judgment, and we consider the facts to be those expressly or impliedly set forth in the pleadings, affidavits, and briefs of the parties, and about which there appears to be no controversy.

Those facts are as follows. For an extended period of time before September, 1981, while the mother was married to another man, the mother and the plaintiff had a sexual relationship.[1] The mother filed a complaint for divorce in May, 1981. The child was conceived the following September. A judgment of divorce nisi was entered on December 8, 1981. The divorce became final on June 9, 1982, and the child was born the next day. The child has lived with the mother since birth and has never lived with the plaintiff. Since September, 1983, the mother has not allowed the plaintiff access to the child. The complaint in this case was filed on September 6, 1983, and after that the mother and her former husband remarried.

By affidavit and in her brief the mother asserts other facts which the plaintiff appears to concede. Those facts are that her remarriage to her former husband occurred on September 12, 1983, the child's birth certificate lists her husband as the father, the husband has never denied his paternity, and since September, 1983, the mother, her husband, the child in question, and an older child of the mother and her husband have lived together continuously. We make those assumptions.

This court has held that a child *born* to a married woman is presumed to be the child of the mother's husband. *Commonwealth* v. *Leary*, 345 Mass. 59, 60 (1962). That presumption of legitimacy may not be rebutted, even in a civil case, "except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father." *Phillips* v. *Allen*, 2

[1] The parties dispute whether their sexual relationship continued into September, October, and November, 1981. They also dispute the extent to which the mother and her husband lived together between late 1981 and the summer of 1983. We make no assumptions as to those facts or other facts in controversy. Resolution of the controverted facts would not affect our decision.

Allen 453, 454 (1861). We hold today that a child *conceived* by a married woman is presumed to be the child of the man to whom the mother was then married even if the mother and the husband are divorced at the time of the child's birth. Our holding fosters the important social policy of affording legitimacy to children whenever possible. See *Powers* v. *Steele*, 394 Mass. 306, 310 (1985); *Green* v. *Kelley*, 228 Mass. 602, 605 (1917). The plaintiff has not urged us to hold otherwise. He simply argues that he should be permitted to rebut that presumption.

Here, the mother was married at the time the child was conceived. The child, therefore, is presumed to be the husband's child. Although we have held that the presumption of legitimacy may be rebutted, and we have defined the burden of proof in that regard, we have never confronted the question whether the presumption may be rebutted by a man claiming to be the child's natural father. Nor does any statute answer the question.

The question was not before us in *Normand* v. *Barkei*, 385 Mass. 851, 853 (1982), on which the plaintiff relies as support for his contention that he has a right to prove that he is the child's father. *Normand* v. *Barkei*, *supra*, sheds little light on the issue before us because in that case the children's mother was unmarried when the children were conceived and were born. There was no question of legitimacy. The plaintiff simply sought an order granting him visitation rights with respect to two children unquestionably illegitimate, that he claimed were his children.

We must decide for the first time, then, whether, in the circumstances of this case, a man is constitutionally entitled to a judicial determination of whether he is the natural father of a child conceived while the mother was married to another man. We conclude that he does not have that constitutional right. We further conclude, as a matter of public policy, that in the circumstances of this case we should not recognize in the plaintiff a common law right to a paternity adjudication.

The plaintiff contends that denying him the opportunity to establish his paternity would deprive him of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. He relies on *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In that case, the Supreme Court stated, "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id* at 651. An understanding of the meaning and limits of that statement is aided by an appreciation of the context in which the statement was made. *Stanley* involved an *acknowledged* father's efforts to prevent his children from being declared wards of the State upon the death of their mother with whom Stanley had intermittently lived for eighteen years. At the time of the conception and birth of the children, the mother was unmarried, as was Stanley. Unlike this case, no presumption of legitimacy was involved. An Illinois statute, conclusively presuming that a father of an illegitimate child is an unfit parent, provided that upon the mother's death the child would automatically become a ward of the State. Focusing on the "cognizable and substantial" interest of a man in the children "he has sired and raised," the Supreme Court held that the conclusive presumption denying Stanley a right to be heard on his fitness as a parent violated Stanley's right to due process. *Id*. at 649-652.

We continue to recognize, as we did in *Normand* v. *Barkei*, *supra*, that ordinarily and unwed father has a legally protectable interest in his children, and that he is entitled to establish that he is their natural father. But it does not follow, and *Stanley* v. *Illinois*, *supra*, does not require, that, in all circumstances, a man claiming to be the father of a child conceived while the child's mother is married to another man is constitutionally entitled to be heard on the question of paternity.

As the plaintiff recognizes in his brief, "the guaranty of due process. . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall

have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934). The Commonwealth has legitimate and strong interests in "the strengthening and encouragement of family life for the protection and care of children." G.L. c. 119, §1 (1984 ed.), and in affording legitimacy to children. *Powers* v. *Steele*, 394 Mass. 306, 310 (1985). Denying a plaintiff the right to establish his paternity in the circumstances of this case promotes those interests. Not only was the child's mother married to a man other than the plaintiff when the child was conceived, but also the husband (the presumed father) has never denied that he is the child's natural father. Furthermore, the child's mother and the presumed father have been remarried almost since the filing of the complaint herein, and, since that time, they have continued to maintain a family unit which includes the child. Although appropriate social policy might be clearer if the marriage had been uninterrupted since the child was conceived, we are satisfied that, in the circumstances obtaining here, denying the plaintiff a right to litigate his paternity bears a substantial relationship to the aforementioned interests of the Commonwealth, and, therefore, does not violate the plaintiff's right to due process. Here, unlike in *Stanley* v. *Illinois*, *supra*, there is a "powerful countervailing interest" that justifies withholding the relief the plaintiff seeks. Our holding finds support in other jurisdictions. See *Vincent B.* v. *Joan R.*, 126 Cal. App.3d 619, 624-627 (1981); *Petitioner F.* v. *Respondent R.*, 430 A.2d 1075, 1078-1079 (Del. 1981); *A.* v. *X, Y, and Z*, 641 P.2d 1222, 1226-1227 (Wyo. 1982).

The plaintiff's constitutional agrument is not limited to the due process clause of the Fourteenth Amendment. He relies also on the Fourteenth Amendment's equal protection clause and on art. 106 of the Amendments to the Constitution of the Commonwealth (the Equal Rights Amendment). The plaintiff's sole argument regarding these constitutional provisions is that to deny him the right to seek an adjudication of his pater-

nity while allowing the child's mother to do so[2] is to establish classifications based on sex, and that such classification is not constitutionally justified by its relationship to any sufficiently important interest of the Commonwealth. It is true that "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." *Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979), quoting *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). It is also true that "classification based on sex is subject to strict judicial scrutiny under the State [Equal Rights Amendment] and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose." *Lowell* v. *Kowalski*, 380 Mass. 663, 666 (1980). But those constitutional principles do not apply in this case because the described classifications are not gender-based. Not only mothers, but presumed fathers as well, may initiate proceedings raising the issue of the child's paternity. *Symonds* v. *Symonds*, 385 Mass. 540, 544 (1982).

That the distinction between those who may initiate paternity proceedings and those who may not do so is not based on sex is enough to defeat the plaintiff's argument. Further discussion, however, is appropriate. Even though no gender-based classification has been established, "[e]qual protection of the laws requires. . . .that all persons in the same category and in the same circumstances be treated alike." *Opinion of the Justices*, 332 Mass. 769, 779-780 (1955). That requirement is met here. The plaintiff is not "in the same category and in the same circumstances" as the mother and her husband, the presumed father, who, with the child in question and another child, constitute a family unit. A challenge to the presumption

[2] "The mother herself is the proper party to seek a complaint for adjudication of paternity, for expenses of the pregnancy and support of the child." *Baby X* v. *Misiano*, 373 Mass. 265, 265 (1977).

that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth. When the same challenge is made by someone within the family, the ruptures in the marriage and the family, most often, have already taken place, and even when the family is intact, those within the family are in far better position than is an outsider fairly to decide whether the family can survive the challenge presented by litigation of the paternity issue. These considerations justify treating persons outside the family differently from persons within it. *Vincent B.* v. *Joan R.*, *supra* at 627; *Petitioner F.* v. *Respondent R.*, *supra* at 1080; *A.* v. *X, Y, and Z, supra* at 1224-1226. But see *R. McG.* v. *J.W.*, 200 Colo. 345, 349-354 (1980).

We conclude that in the circumstances presented by this case a man does not have a constitutional right to an adjudication of whether he is the father of a child conceived while the child's mother was married to another man. Also, because of the social policy we have discussed above in favor of affording legitimacy to children, whenever possible, and of "strengthening and encourag[ing] family life for the protection and care of children," we conclude that we should not recognize in the plaintiff a common law right to such an adjudication. We express no opinion as to whether the child could, at some point, for the purpose of establishing inheritance rights or for any other purpose, bring an action attempting to prove that the plaintiff is his natural father. We remand the case to the Probate and Family Court with instructions to enter an order dismissing the plaintiff's complaint.

So ordered.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 85-0009

P B C
v.
D H

MEMORANDUM AND ORDER

This is a petition by the defendant, D H , under G.L. c. 231, §118, first par., for relief from an order of the Probate Court denying her motion to dismiss for lack of standing and for failure to state a claim. The primary question is the question of standing.[1] Memoranda of law have been received from counsel for all interested parties. As a single justice, I have no power to allow a motion to dismiss which has been denied in the Trial Court. I can, however, certify the issues raised by the motion for interlocutory review by a panel of this Court. I conclude that the issues should be so certified. My reasons follow.

The facts relevant to the standing issue are these. D H and W H were divorced by a judgment of divorce nisi entered on December 8, 1981, which became final on June 9, 1982. N H was

[1] No separate argument has been made on the failure to state a claim branch of the motion. This ground is subsumed within the standing branch of the motion.

born on June 10, 1982, one day after the divorce became final. W H was named as N 's father on the birth certificate. It is undisputed that the plaintiff, P B C , had an intimate relationship with D H which extended over a period of time, but the exact dates of the beginning and the end of the relationship are in dispute. The plaintiff's affidavit, filed with his complaint and largely unrebutted, alleges that he had sexual relations with D H during the time when N was conceived, that D told him and a therapist that the plaintiff was N 's father, and that D requested money from the plaintiff for the child's support. He subsequently purchased a home where D lived with the child for several months, during which time the plaintiff visited the child often and had him for overnight visits. In early September of 1983, D informed the plaintiff that she was moving away from the house with the child, and the plaintiff filed his action to establish his paternity and to obtain visitation rights. D H remarried W H on September 12, 1983, subsequent to the filing of the plaintiff's complaint.

The defendant's motion to dismiss alleges that the plaintiff lacks standing to bring a claim for paternity with respect to N H because the child is presumed legitimate pursuant to both statutory law, see G.L. c. 46, §6 and G.L. c. 190, §7, and common law. The defendant argues that only the mother and presumed father of a legitimate child should have standing to challenge the child's legitimacy. She bases her view upon Massachusetts cases which she reads a protecting the status of legitimate children by limiting standing and posing substantial evidentiary requirements for overcoming the presumption of legitimacy. However, the defendant concedes that this is an issue of first impression in Massachusetts, and the relevant law is not easily applied to the facts of this case.

1. *Presumption of legitimacy.* The defendant asserts two alternative theories for the child's presumed legitimate status: first, that he was conceived during wedlock, and thus is presumed legitimate, see G.L. c. 46, §6, and second, that her subsequent remarriage to her husband and the husband's acknowledgement of Nathaniel as his child render Nathaniel legitimate pursuant to G.L. c. 190, §7.

(a) It is clear that a child *born* in lawful wedlock is presumed legitimate in Massachusetts, see *Commonwealth* v. *Leary*, 345 Mass. 59, 60 (1962) and cases cited. I cannot find any Massachusetts decision holding that a child *conceived* in lawful wedlock is presumed legitimate. However, an Attorney General's opinion, relying on the *Leary* case and a Michigan case, states that a child conceived in wedlock is presumed to be legitimate, see Op. Atty. Gen., June 12, 1970, and that presumption comports with the great weight of authority in this country.[2] If the presumption extends to children conceived in wedlock, Nathaniel Homer would be presumed legitimate under Massachusetts common law.[3]

The common law presumption of legitimacy is not conclusive, however, and may be rebutted by facts which prove, beyond a reasonable doubt, that the husband could not have been the father. *Commonwealth* v. *Leary*, *supra* at 60. Proof of impotency, non-access, or exclusion by a blood grouping test are all competent to overcome the presumption of legiti-

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[2] I generally hesitate to cite C.J.S. as authority but in this instance the weight of authority is adequately and accurately collected in 10 C.J.S., Bastards, §3C.

[3] The defendant's reliance on G.L. c. 46 is misplaced. The statute does not explicitly create a presumption of legitimacy, but merely directs town clerks as to what information must be contained in birth and death records. The above cited opinion of the Attorney General requires that the town clerk record a birth as legitimate if the child was conceived during wedlock. However, the information recorded on a birth certificate is not conclusive, but is only prima facie evidence of the facts recorded. G.L. c. 46, §19. Furthermore, the record of legitimacy may be amended if illegitimacy is legally determined or has been admitted by affidavit of the mother and husband. G.L. c. 46, § 13.

macy. *Ibid.* This distinguishes Massachusetts from a great many jurisdictions which have created a statutory presumption of legitimacy which is conclusive as to everyone but the mother and her husband, or the husband and his heirs. See Annot., Who May Dispute Legitimacy of Child, 90 A.L.R.3d 1032, 1036-1057. A great many of the cases which the defendant relies upon to support her standing argument arose in jurisdictions which have a conclusive statutory presumption of legitimacy, and thus are inapposite.

(b) For purposes of establishing the inheritance rights of illegitimate children, G.L. c. 190, §7, provides that an illegitimate child shall be deemed legitimate if his parents intermarry and his father acknowledges him as his child or has been adjudged as his father pursuant to G.L. c. 273. The statute gives the illegitimate child the right to establish paternity, but does not address the issue of who may question paternity. C argues that the statute does not foreclose his claim because the terms "parents" and "father" mean the real, natural parents and father of the child, and W H is not N 's real father.

2. *Standing* Although §§11 through 15 of G.L. c. 273, do not expressly confer standing on any individual to challenge the presumption of legitimacy of a child born in wedlock, cases decided pursuant to that statute have made it clear that both the mother and her husband may challenge the presumption and establish that someone else is the child's real father. See *Commonwealth* v. *Stappen*, 336 Mass. 174, 176-177 (1957); *Commonwealth* v. *Leary*, 345 Mass. 59, 60 (1962).

There is no Massachusetts statute which expressly grants putative fathers standing to establish paternity, but a recent case has recognized that G.L. c. 215, §6, grants a Probate Court jurisdiction to adjudicate the visitation rights of a father who asserts his paternity of an *illegitimate* child. *Normand* v. *Barkei*, 385 Mass. 851, 852 (1982). If the plaintiff's paternity is questioned, the court also has jurisdiction to determine the

paternity issue. *Ibid.* at 853. The *Barkei* case recognizes that the general weight of authority grants visitation rights to the father of an illegitimate child if it is in the child's best interests, *ibid.*, and that the right to visitation may have a constitutional basis. *Ibid.* at note 1. *Barkei* also recognizes that a putative father has no other remedy, either pursuant to G.L. c. 273, or any other statute, to establish his paternity and visitation rights. The question presented here is whether the remedy provided by G.L. c. 215, §6, as described in the *Barkei* case, would be extended to a person who asserts that he is the father of a child who may be presumed to be the legitimate child of another man.

In other jurisdictions, the cases involving standing to dispute the legitimacy of a child break down into basically three categories: (1) cases based on statutes which explicitly limit standing to specific persons, (2) cases based on statutes which neither directly grant nor limit standing, and (3) standing based on non-statutory grounds. In each of these categories, the courts are divided on the question of whether the asserted natural father has standing to challenge the presumption of legitimacy. See Annot. 90 A.L.R.3d, *supra*. Generally, when the statute which creates the presumption explicitly limits standing to certain persons, the courts have been reluctant to permit a man claiming to be the natural father to contest the presumption of legitimacy. See 90 A.L.R.3d *supra*, §§5 and 15. However, some recent cases have determined that even in a jurisdiction which expressly limits standing, it may in certain circumstances be a denial of due process or equal protection to deny the asserted natural father standing to contest the presumption of legitimacy. See 90 A.L.R.3d *supra* at §5; *R. McG.* v. *J.W.*, 615 P.2d 666 (Colo. 1980); *Re R.*, 13 Cal.3d 635 (1975).

Although these cases are inapposite because there is no statutory presumption of legitimacy in Massachusetts, some of the constitutional considerations discussed therein may be equally

applicable to our common law presumption, especially in light of the strict scrutiny given to classifications based on gender under the Massachusetts Equal Rights Amendment. See *Lowell* v. *Kowalski*, 380 Mass. 663, 666 (1980). To permit the mother to question the presumption of legitimacy in proceedings under G.L. c. 273, while denying the asserted father a forum to challenge the presumption, may be a gender-based distinction which will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose. *Ibid.* The *Kowalski* case recognizes that the State has a compelling interest in differentiating between fathers and mothers of illegitimate children for purposes of inheritance laws because of the greater difficulties associated with establishing paternity and the greater potential for fraud. *Ibid.* at 669. However, the decision struck down as too broad an absolute requirement that the child's parents intermarry in order for the father's acknowledgement of the child to entitle him to inherit. *Ibid.* Similarly, it is likely that the State has a compelling interest in protecting the legitimacy of children conceived in wedlock, but denying standing to the asserted natural father may be too broad a remedy. See *R. McG.* v. *J.W.*, *supra* at 670. But see *A.* v. *X, Y and Z*, 641 P.2d 1222 (1982) (asserted father not granted standing; strict scrutiny not applied). The evidentiary requirement of proof beyond a reasonable doubt may be sufficient to achieve the State's goal of protecting legitimate children while simultaneously protecting the asserted father's right to visitation, if he can prove that he is the natural father and that such visitation would be in the child's best interests.

All of the above, persuades me that the issue of standing in the circumstances present in this case has not been definitively settled in Massachusetts and ought to be before the case proceeds further. This is particularly so in view of the recent development of the law with respect to the constitutional

rights of fathers of illegitimate children based on the holding and implications of *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

This leads to a second relevant consideration. The traditional dogma on the certification of appeals from the denial of motions to dismiss is to deny certification on the sound theory that the question of the propriety of the denial of the motion can be decided, if still relevant, in an appeal from the final judgment entered in the case. The dogma appears to have surface appeal here in view of the virtually irrefutable accuracy of the HLA blood-grouping test. It appears that the results of that test will settle the merits of paternity in this case one way or the other, and it is tempting to say that the test ought to be performed and its decisive results made known. There is a flaw in this logic, however, with respect to the rights of the child. If the test demonstrates that the plaintiff is the father, and if an appellate court finally determines that the plaintiff lacks standing, there may be serious long-lasting emotional damage done to the child. The case has already been terribly traumatic for all the parties and the prospect of added trauma to an innocent child should, whenever possible, be avoided. It can be so avoided here by permitting the standing issue to be settled out of turn. Expediting the appeal will minimize the time delay which imposes a burden on the other parties and will provide the full measure of preliminary review to which I think the parties are entitled.

Accordingly, it is ordered:

(1) that the defendant is permitted to file a notice of appeal from the order of the Probate Court denying her motion to dismiss, and is further permitted to prosecute an interlocutory appeal from the order of denial to a panel of this Court;

(2) that the decision of the appeal is to be expedited by (a) the defendant filing her brief and appendix on or before February 22, 1985, (b) the plaintiff and counsel for the child filing their briefs (and any supplemental appendices) on or before March 18, 1985, and (c) the appeal being placed on the April

list for oral argument in this Court;[4] and

(3) that further proceedings in the Probate Court in the case be stayed until further order of this court or a single justice thereof.

By the Court (GREANEY, C.J.),

s/WARREN L. SHIELDS
ASSISTANT CLERK

Entered: January 29, 1985

[4] Extension of these time limits will be granted only for extraordinary cause.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
PROBATE & FAMILY COURT
MIDDLESEX DIVISION
No. 5170

P B C
v.
D H

MEMORANDUM AND ORDER

This matter came on before the court for hearing on plaintiff's Motion to Compel and for Sanctions, and on defendant's Motion to Dismiss for Failure to State a Claim upon which relief can be Granted and on plaintiff's Motion for Trial Date Certain. Present were the attorney for the plaintiff, Muriel Carpenter; the attorneys for the defendant, Steven Dean and Harley Anderson; and the attorney for the minor child, Malcolm Donahue.

The central issue in the case at this stage concerns the paternity of the minor child, N H . Mr. and Mr. H were divorced by a Judgment of Divorce Nisi dated December 8, 1981 which became final on June 9, 1982. At the time of the divorce, the H had one (1) child. Mrs. H was three (3) months pregnant with N at the time of the Judgment of Divorce Nisi. It is undisputed that the plaintiff and D H had an intimate relationship which extended over a period of time, the exact time of the beginning and of the end of the relationship is in dispute. Mr. and Mrs. H were remarried in September, 1983, after the commencement of the current action.

The current action has been before the Trial Court, a Single Justice of the Appeals Court (on two occasions), the full panel

of the Appeals Court (which declined to hear the matter), and a Single Justice of the Supreme Judicial Court on the question as to whether all of the parties should be compelled to submit to the HLA Blood Grouping Tests, and on the issue of the appropriate sanctions for failure to submit to the tests. Initially, the Trial Court refused to order the defendant, D H , and the child to submit to the HLA Blood Grouping Tests. Based on the strong showing made in the petitioner's affidavit, which is substantially unrebutted by the defendant and the high degree of accuracy of the HLA Blood Grouping Tests for determining paternity Chief Justice Greaney concluded that it was an abuse of discretion for the trial judge to deny the petitioner's Motion for the test as evidence in the petitioner's pending Probate and Family Court action to establish paternity. Mr. Justice Wilkins of the Supreme Judicial Court declined to exercise jurisdiction under G.L. c. 211, §3 to vacate the order for blood tests.

Upon remand Associate Justice Coffey of the Middlesex Probate and Family Court ordered all parties to submit to the HLA Blood Grouping Tests. When the defendant, D H , refused to comply Judge Coffey imposed as a sanction the suggestion of Associate Justice Wilkins of the Supreme Judicial Court that she would be taken to have conceded that the tests would not exclude the petitioner's paternity and that the plaintiff would be entitled to show the significance of that concession on a percentage basis. The plaintiff appealed the sanction as being inadequate and the original sanction was sustained by Chief Justice Greaney of the Appeals Court as not constituting an abuse of discretion.

The plaintiff appeared before this Judge on December 19, 1984 seeking to set a trial schedule. Without having any prior knowledge of the proceedings enumerated above, this court suggested that the HLA Blood Grouping Tests was the most probative evidence on the issue of paternity and suggested that an appropriate motion be filed in order that the court might deal with the issue before establishing a trial date.

In view of the long involvement of Associate Justice Coffey with this case, inquiry was made whether he sought to retain jurisdiction. Counsel informed the court that Associate Justice Coffey was not retaining jurisdiction of this matter and have so stated on the record. The court notes that by a second Motion for custody, visitation and sanctions, the plaintiff, on September 20, 1984 sought among other things to have a finding entered that the plaintiff be declared the natural father of the minor child. The Motion was based on the refusal of the defendant to submit to the HLA Blood Grouping Tests. Associate Justice Coffey denied the Motion "without prejudice to be re-submitted at the time of trial."

This court is now faced with a serious dilemna. The defendant now seeks to have the matter dismissed on the grounds that only the husband and wife have standing to challenge the paternity of a child conceived during coverture. Although this question has not specifically been raised until now, the matter was impliedly considered by Chief Justice Greaney of the Appeals Court in his statement concerning the strong showing made in the petitioner's affidavit. In the petition before Mr. Justice Wilkins under G.L. c. 211, §3 to vacate the order for the blood tests, Justice Wilkins stated, "It is not argued here that a man in the position of C has no right to have his request for visitation considered, assuming he is found to be the child's father." In view of the prior proceedings in this case involving the propriety of the blood tests, and the showing of the plaintiff in his Affidavit and the undisputed evidence in this case, this court does not believe that a Motion to Dismiss is appropriate at this time. Whatever the merits of the defendant's position can be preserved and, if necessary, argued on appeal after the case has been determined on the merits. To encourage further piecemeal appellate review of this issue under the circumstances of this case would be inappropriate. All parties are entitled to some finality.

With respect to the trial of the case on the merits, this court is concerned with the adequacy of the current sanction for failure to submit to the HLA Blood Grouping Tests. On the one hand, the defendant may have good reason for refusing to take a test which has the possibility of producing highly probatives evidence which could not only illegitimatize her child, but also seriously disrupt her current family situation. On the other hand, the plaintiff has stated a sufficient case so as to pursue his claim seeking to establish paternity. At this point in time when the line between children born in and out of wedlock is nowhere near as strong as it once was, and no one questions that the HLA Blood Grouping Tests has a degree of accuracy far greater than the old exclusionary test, the court is most reluctant to proceed without obtaining the best available evidence. If the test is properly given, no significant physical intrusion of any of the parties is involved. If the test is not taken the court may well be deprived of the most probative available evidence in determining the constitutional rights of all the parties involved.

Another question which arises by the failure to obtain the most probative available evidence concerns the burden of proof. Where a plaintiff seeks to establish paternity in a situation which would not only illegitmatize a child conceived during coverture, but would also be potentially disruptive of an intact family, the burden of proof may be more than the customary civil standard. Under these circumstances, the results of a properly administered HLA Blood Grouping Tests are even more compelling. The HLA Blood Grouping Tests has the potentiality of affirmatively determining paternity. The current imposed sanction places the court in the same position it was in with respect to blood grouping tests as existed prior to the HLA Blood Grouping Tests.

In view of all of the above, it is hereby Ordered that:

1. The defendant's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted is denied.

2. The defendant is ordered to appear and produce the minor child, N H , for HLA Blood Grouping Tests within thirty (30) days at a time and a place to be arranged by all counsel. If the defendant has not complied with the order to participate in the HLA Blood Grouping Tests, she shall appear before this court on Tuesday February 12, 1985 at 9:00 a.m. at which point the court will consider, among others, the following sanctions: (a) that the defendant be foreclosed from presenting any evidence of any kind whatsoever, whether in her case, or in rebuttal of the plaintiff's case pertaining to the issue of paternity; (b) that the defendant be incarcerated until she agrees to comply with the order; (c) that the defendant be assessed daily costs until she complies with the order.

3. Associate Justice Edward M. Ginsburg shall retain exclusive jurisdiction over all aspects of this case.

By the Court,

January 2, 1985
Date

s/ EDWARD M. GINSBURG
EDWARD M. GINSBURG,
ASSOCIATE JUSTICE

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT
MIDDLESEX, SS.

P B C,
PLAINTIFF,
v.
D H,
DEFENDANT.

COMPLAINT IN EQUITY FOR THE ESTABLISHMENT OF PATERNITY AND FOR OTHER RELIEF PURSUANT TO M.G.L. Ch. 215 §6

1. The plaintiff, P B C ("the putative father"), resides at , Arlington in the County of Middlesex, Massachusetts.

2. The defendant, D H ("the mother"), resides at , Lexington in the County of Middlesex, Massachusetts.

3. N H ("the child"), resides at , Lexington in the County of Middlesex with the mother.

4. The child was born on June 10, 1982, when neither the mother nor the putative father were married.

5. Beginning in 1978, the mother and the putative father became involved in a close friendship which has continued to the present and which involved sexual intimacy prior to, during and subsequent to the time the child was conceived.

6. The putative father and the mother had sexual relations in September, 1981, and the mother has told the putative father that it was on that occasion that the child was conceived.

7. The mother has also told the putative father that she was sexually intimate with her former husband, W H , during the period August-September, 1981.

8. In the early months of 1982, the mother was reestablishing a relationship with her former husband, and she began living with him again in or about March, 1982.

9. In or about April, 1982, the defendant initiated a visit at the plaintiff's residence with the plaintiff and his two children of a former marriage who reside with the plaintiff.

10. In June of 1982, the mother phoned the teenaged daughter of the putative father to announce the birth of the child.

11. After the child was born, the mother told Eve Welts, her psychotherapist at McLean Hospital in Belmont, Massachusetts that the child was fathered by the plaintiff.

12. The mother's statement of the plaintiff's paternity to psychotherapist Welts was followed by a series of joint therapy sessions attended by Ms. Welts, the putative father and the mother and on one occasion by the child in addition to the others.

13. At the aforementioned joint therapy sessions, the parties discussed the plaintiff's paternity and the potential future relationships of the mother, putative father and child. The father stated during the course of these sessions that he wanted to act as a father toward the child and to be publicly acknowledged as his father; the mother indicated that she did not want to marry the putative father.

14. Soon after the child's birth, the mother began taking the child with her to the putative father's home for visits with him and his two teen-aged children.

15. In a conversation with the child's father which occurred several months after the child's birth, the mother asked the putative father for child support of fifty ($50) dollars per week and told the putative father that she and her former husband had plans to split up and would cease living together.

16. At a later meeting between the putative father and the mother, the mother requested that the putative father pay a higher amount of child support—one hundred ($100)dollars per week—in that her former husband would be willing to pay that amount. She also stated that she loved the putative father and wanted to live near him.

17. The parties subsequently agreed that the putative father would purchase a home in which the mother and child could live and for which the putative father and mother would contribute to the payment of the mortgage principal and interest and taxes. The putative father was to pay four hundred ($400) per month toward these expenses.

18. The putative father purchased a home in Lexington in the County of Middlesex, Massachusetts in the spring of 1983, and the mother and child have lived there since June, 1983.

19. On the day the mother moved into the Lexington home, the child stayed with the putative father at his nearby home in Arlington.

20. Since the mother and child moved into the Lexington home, the putative father has typically visited the child several evenings during the week and on Saturdays during the day.

21. Visits between the putative father and the child take place at the child's residence, at the putative father's home and at other locations.

22. Often the mother is not present when the putative father visits with the child.

23. The plaintiff's teen-aged daughter babysits at the mother's residence when the mother is at work, and the putative father has visited the child during these times.

24. The putative father has purchased items for the use and benefit of the child, and there is a crib and portable high chair for the use of the child at the putative father's home.

25. The putative father has participated in many activities with the child typical of fatherhood such as bathing the child, changing him, putting him to bed and playing with him.

26. The child recognizes the putative father and appears happy to see him.

27. The father is trained as a pediatrician and a child neurologist and is aptly suited by temperment, training and experience to care for the child and to provide him with a loving, stable and financially secure environment.

28. The mother recently has told the putative father's teenaged son that the child and he are brothers.

29. It is in the child's best interest that a close relationship between him and the putative father be maintained and that his legal paternity be established.

30. The mother has told the putative father that she plans to move out of the Lexington house on or before September 15, 1983 and that he should begin seeking tenants for the house immediately.

31. The mother has not told the putative father where she will move with the child.

WHEREFORE, the plaintiff prays that this Honorable Court:

1. issue a temporary restraining order enjoining the defendant from removing the child from the Commonwealth of Massachusetts;

2. issue a temporary restraining order prohibiting the defendant from leaving her residence at in Lexington, Middlesex County, Massachusetts before indicating to the plaintiff where her new residence will be and ordering the defendant to give notice to the plaintiff of her address pending a determination of paternity and resolution of this action;

3. after hearing, permanently restrain the defendant from removing the child from this Commonwealth unless both parents consent to the removal;

4. enter a Declaratory Judgment that the plaintiff is the natural father of the child;

5. grant custody of the child to the plaintiff;

6. grant visitation rights to the plaintiff in the event that physical custody is not granted to him;

7. grant such further relief as it deems meet and just.

P B C

By his attorney,

s/ MURIEL N. CARPENTER
MURIEL N. CARPENTER
ESDAILE, BARRETT & ESDAILE
75 Federal Street
Boston, Massachusetts 02110
(617) 482-0333

DATE: September 6, 1983

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT
MIDDLESEX, SS.

P B C,
PLAINTIFF,
v.
D H,
DEFENDANT.

AFFIDAVIT OF THE PLAINTIFF

I, P B C , hereby affirm that the following facts are true to the best of my knowledge and belief:

1. I am a physician employed in the emergency room at the Whidden Hospital in Everett, Massachusetts.

2. In 1978, I became acquainted with the defendant, D H , who worked as a nurse at the emergency room at Whidden Hospital.

3. In the latter part of 1977 my divorce from my former wife became final, and the defendant, knowing that I had gone through a divorce, began discussing her marital difficulties with me.

4. At some point in 1978 D separated from her husband, and my relationship with her became closer. Understanding the difficulties she was experiencing I tried to help her and recommended, for example, that she see psychotherapist Eve Welts at McLean Hospital, who had been very helpful to me during my divorce proceedings. I also suggested that she retain, David Lee, Esquire, the lawyer who had represented me and she eventually retained him.

5. As we became closer, D and I began having a sexual relationship intermittently until one evening in August of 1981 when D called me, took me out to dinner and

then back to her apartment. She stated that evening that she did not want to continue with our relationship unless I was ready to make a long-term commitment to her. I was unable to give her the commitment she wanted, and it was decided that we would no longer see each other.

6. About three weeks later, D , seeming very upset, phoned me and asked that I see her immediately. She came to my house at her request, and we had a discussion and eventually engaged in sexual relations. I was later to be told by D that it was on this evening that she became pregnant with the child known as N H , who I believe is my son.

7. Over the course of the next few months (October/November, 1981) I continued to see D episodically, and we continued to be sexually intimate on occasion.

8. At the end of 1981, we did not see each other at all until I called and asked to see her in or about January, 1982 when we met at a Howard Johnson's restaurant. She did not remove her coat during our meeting, and she told me that she would not see me again.

9. In March of 1982 another emergency room nurse told me that she had seen husband and that D was pregnant and trying to work things out with him.

10. In late April or May, 1982, D called me and said that she missed my children and wanted to visit them at my home which she did. (I have an 18 year old son and a 15 year old daughter of my former marriage living with me.)

11. Shortly after giving birth to N. on June 10, 1982, D phoned my daughter to announce the news of the birth. (D divorce of her former husband W had become absolute on June 8, 1982.)

12. In July of 1982, D arrived at my home with N. to show him to me and the children.

13. A couple of weeks later, D again visited my home with the child and asked me how I felt about her. I was

surprised by the question because I knew she was still living with her former husband W and I replied, "What do you mean, you're back with your husband." I then asked it the new-born child was mine. Deborah became upset by the question, stated that I had no right to ask it and left abruptly.

14. Shortly thereafter at a therapy session with therapist Eve Welts, D stated that I am the father of N. H. There followed joint meetings at the therapist's office which D and I attended. The child was at one of the meetings. We discussed the child's future and the relationships of the three of us. I stated that I wanted to act as a father toward N. H. and to be publicly acknowledged as his father. The therapist suggested that D wanted me to marry her, but D denied this.

15. D continued to bring N to my home a couple of times per week, and during this period D told me that she had informed W that the child is mine. D asked me for fifty ($50) dollars per week in child support and stated that she and W would be splitting up.

16. Later at a lunch meeting, D told me that she loved me and wanted to live near me. She said that she would cease living with her former husband, but she wondered if I would be willing to pay one hundred ($100) dollars per week in child support because her former husband had offered to pay that much.

17. We resolved the matter by deciding that I would purchase a home in which D and the baby and her older child could live, and I would pay four hundred ($400) dollars per month toward the mortgage (PIT) and she would pay the balance as rent. The plan was to purchase a large enough house so that D could also have a house-mate share expenses.

18. I took D to a realtor and in the spring of 1983 a nice Cape-style home in Lexington was found near a play-

ground and good schools. Lexington was chosen because of its proximity to where I live and its suitability as a place to raise children.

19. D moved in in June of 1983. I took care of the baby on the day she moved in. Her former husband helped her move in.

20. Since D has moved into the Lexington house, I have taken advantage of her proximity to visit N several times each week. Often my daughter babysits for N while D is at work, and these are times I often stop by to see the baby. I frequently give the baby a bath and put him to bed. On Saturdays I have taken him for much of the day. N is happy to see me and reaches for me when I arrive. I play with him, change him, feed him and enjoy being with him. N has slept overnight at my house, and there are a crib and portable high chair at my house for him to use.

17. Although the current thrust of my medical practice is research in the fields of neuroanatomy and electronmicroscopy, I am trained as a pediatrician and adult and child neurologist. I am willing and able to care for N and to provide for his physical, emotional and financial needs.

18. I have asked D to marry me recently, and she has refused. I have requested that she affirm my paternity, and she has refused. She will not submit to blood-grouping tests to confirm N 's paternity.

19. Most recently D has told me that she is moving from the Lexington house and that I am to immediately begin showing the place to prospective tenants. While driving by her home one evening recently I saw her packing suitcases into a car which I did not recognize. She has spoken in the past of possibly going to live with her family in Georgia. She tells me that she isn't looking for an apartment in this area and states in answer to my inquiries that she doesn't

20. Given D 's recent pronouncements about moving, her act of packing, her telling me to find new tenants for the Lexington house and her vagueness with regard to where she will go, I fear that she will move beyond the jurisdiction of this court or that I may not be able to locate her and the child and I will thereby lose my right to have N 's paternity determined and to have a part in his care and custody, which I believe are in his best interest.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY, THIS 6th DAY OF SEPTEMBER, 1983

s/ P B C
P B C

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT
DOCKET NO.

MIDDLESEX, SS.

P B C ,
PLAINTIFF,
v.
D H ,
DEFENDANT.

PLAINTIFF'S MOTION FOR BLOOD GROUPING TESTS TO AID IN THE DETERMINATION OF THE ISSUE OF PATERNITY

Now comes the plaintiff in the above-captioned action and respectfully requests that the court order the defendant and the minor child, whose paternity is at issue, to submit, along with the plaintiff, to human leukocyte antigen (HLA) white blood cell and red blood cell tests and to whatever additional blood or tissue tests are deemed necessary by a qualified laboratory to aid the court in its determination of the paternity of the minor child. The plaintiff requests that the testing be ordered to be done forthwith at the Center for Blood Research in Brookline, Massachusetts or at such other qualified facility as the Court may choose.

As grounds for this motion, the plaintiff states that the blood grouping/tissue testing which is being requested by the plaintiff has a high degree of accuracy in determining paternity as recognized by the statutory and case law of this Commonwealth. (See e.g. M.G.L. ch. 273 §12A and *Commonwealth* v. *Blazo*, 1980 Mass. App. Adv. Sh. 1473.)

Respectfully submitted,

P B C

By his attorney,

s/ MURIEL N. CARPENTER

MURIEL N. CARPENTER
ESDAILE, BARRETT & ESDAILE
75 Federal Street
Boston, Massachusetts 02110
(617) 482-0333

DATE: Sept. 16, 1983

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT
DOCKET #5170

MIDDLESEX, SS.

P B C ,
PLAINTIFF,
v.
D H ,
DEFENDANT.

PETITION OF PLAINTIFF FOR REVIEW OF INTERLOCUTORY ORDER OF THE PROBATE AND FAMILY COURT PURSUANT TO M.G.L. C.H. 231, SEC. 118 (FIRST PARAGRAPH)

The above captioned matter is currently pending in the Trial Court of Massachusetts, Probate and Family Court Department. It is docketed in Middlesex County.

By his Complaint, the petitioner, P B C , seeks to have his right to the custody or visitation of the minor child, N H established pursuant to the Probate Court's general equity jurisdiction. The petitioner believes he is the natural father of N , who was born on June 10, 1982. Neither party was married when N was born. The respondent denies the petitioner's paternity. *Normand* v. *Barkei*, 385 Mass. 851 (1982) holds that the Probate Court has jurisdiction to determine paternity in an action such as that which the petitioner has commenced wherein he is asserting that he is the father of an illegitimate child and is seeking visitation rights.

The petitoner appeals from the Court's denial of a discovery motion—his Motion for Blood Grouping Tests to aid in the Determination of the Issue of Paternity. Said Motion was

denied on October 13, 1983 and again denied after rehearing on November 7, 1983. A copy of the Motion and copies of both denials are attached hereto and marked Exhibits A1, A2 and A3 respectively.

On or about September 3, 1983, the petitioner filed his verified Complaint in Equity for the establishment of paternity and for other relief pursuant to M.G.L. Ch. 215, Sec. 6. The Complaint is attached hereto and marked Exhibit B. In addition the petitioner filed an Affidavit with the Probate Court, marked Exhibit C, in which he set forth the factual basis for his belief that he is the father of N H .

On September 23, 1983, petitioner's Motion for Blood Grouping Tests was argued before the Probate Court. The Court indicated that the results of said tests would be admissible into evidence at the trial of the action whether they exclude the petitioner as the father of the child or are supportive of his claim that he is the father. The Findings of Fact and Conclusions of Law of the trial judge after hearing the *Normand* v. *Barkei, supra*, further support the petitioner's contention that blood test results supportive of a putative father's claim of paternity are admissible into evidence in proceedings such as this one. See Pages 8-13 of the *Normand* v. *Barkei* Findings of Fact and Conclusions of Law attached hereto and marked Exhibit D.

The Court indicated at the first hearing of the petitioner's Motion for Blood Grouping Tests that it would not entertain petitioner's Motion for Temporary Orders (Exhibit E) requesting joint legal custody, reasonable visitation rights and that a *guardian ad litem* be appointed to determine what was in the child's best interest with regard to custody and visitation. The Court indicated at that time that the paternity issue had to be established according to the *Normand* v. *Barkei* decision prior to the making of any court order with regard to custody or visitation.

The petitioner maintains that his Motion for Blood Grouping Tests should be allowed forthwith so that the results can be obtained, paternity of the child firmly established and so that the petitioner can continue to pursue his right to visit the child, which may be a right of constitutional stature, *Normand* v. *Barkei* at 852.

P B C

By his Attorney:

s/ MURIEL N. CARPENTER
MURIEL N. CARPENTER
ESDAILE, BARRETT & ESDAILE
75 Federal Street
Boston, MA 02110
617/482-0333

DATE: November 22, 1983

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 84-87

P B C

v.

D H

ORDER

I have reviewed all the papers in this case and heard the arguments of counsel. Based on the strong showing made in the petitioner's affidavit (which is substantially unrebutted by the defendant), and the high degree of accuracy of the HLA blood grouping test for determining paternity, see *Commonwealth* v. *Blazo*, 10 Mass. App. Ct. 324, 325-327 (1980), I conclude that it was an abuse of discretion for the judge to deny the petitioner's motion for the test as evidence in the petitioner's pending Probate Court action to establish paternity. I do not see any impermissible intrusion on the defendant's constitutional rights by the conduct of the test. I do perceive a potentially serious constitutional problem if the test is not allowed, *viz.* the deprivation to the petitioner of the most probative, available evidence for maintenance of a significant claim.

Accordingly, an order is to enter in case no. 5170 in the Probate and Family Court Department for Middlesex County, pursuant to Mass.R.Dom.R.P. 26 and 35, directing the peti-

tioner, the defendant, and the child, N H , to submit to the Human Leukocyte Antigen blood cell test for the purpose of determining the question of paternity. All further proceedings necessary to enforce this order are to be conducted in the Probate Court.

By the Court (GREANEY, J.)

s/ SUSAN MILLER
ASSISTANT CLERK

Entered: January 3, 1984

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 83-0505-CV

P B C

v.

D H

ORDER

It is ordered that the appeal in this matter be, and the same hereby is, dismissed for lack of jurisdiction in a panel of the justices to entertain the appeal because it was taken from a purely interlocutory order for discovery (see Mass.R.Civ.P. 35[a]) which was entered by a single justice acting under the first paragraph of G.L. c. 231, §118, as appearing in St. 1982, c. 65.

By the Court (GRANT, KASS & WARNER, JJ.)

s/ WARREN L. SHIELDS
ASSISTANT CLERK

Entered: May 2, 1984

APPENDIX J

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY

No. 84-160

SUFFOLK, SS.

D H ,

PLAINTIFF,

v.

P B C ,

DEFENDANT.

JUDGMENT

This matter came before the Court, Wilkins, J., presiding, and in accordance with the memorandum of decision filed this day;

it is ORDERED and ADJUDGED,

that the petition for relief under G.L. c. 211, §3, be and the same hereby is, denied.

Dated at Boston, Massachusetts this seventh day of June, 1984.

s/ JOHN E. POWERS
CLERK OF COURT

A true copy.
Attest:
June 7, 1984

s/ JOHN E. POWERS
CLERK

APPENDIX K

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY

No. 84-160

SUFFOLK, SS.

D H ,

PLAINTIFF,

v.

P B C ,

DEFENDANT.

MEMORANDUM OF DECISION

I decline to exercise the extraordinary power of this court under G.L. c. 211, §3, to vacate the January 3, 1984, order that certain blood cell tests be given. It is not argued here that a man in the position of C has no right to have his request for visitation considered, assuming he is found to be the child's father. I do not know the reasons why the motion judge denied the request for blood tests. The question whether C is the father of the child is an important one in the underlying action. A judge should not deny blood testing in such a case unless there is some articulable reason. The preliminary showing by C was sufficient to warrant blood testing in this case. Here, again, I stress that H does not claim that C has no rights to have his visitation request considered if he is the child's natural father.

One further comment seems appropriate. H and the child (acting through H , assuming no guardian has been or will be appointed to protect the child's interests) may decline to take the test. H might be in contempt of court, but the consequence may simply be that she will be

taken to have conceded that the tests would not exclude C 's paternity. C will be entitled to show the significance of that concession on a percentage basis. It may be that a blood test of the husband will also be appropriate in resolving the paternity question.

s/ HERBERT P. WILKINS

HERBERT P. WILKINS,
ASSOCIATE JUSTICE

June 7, 1984

A true copy.
Attest:
June 7, 1984

s/ JOHN E. POWERS
CLERK

APPENDIX L

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT
DOCKET #5170

MIDDLESEX, SS.

P B C
PLAINTIFF
v.
D H
DEFENDANT

MOTION FOR ORDER OF BLOOD GROUPING TESTS

Now comes the plaintiff in the above-captioned matter and requests that the Court order the parties and child, N H , to submit to blood grouping tests, including HLA tests, on Wednesday, June 20, 1984 at 10:15 a.m. at the Center for Blood Research, 800 Huntington Avenue, Boston, Massachusetts.

As grounds for this Motion, plaintiff states that said testing has been ordered by the Single Justice of the Appeals Court and said time, date and place are available.

Respectfully submitted,
P B C

s/ MURIEL N. CARPENTER

MURIEL N. CARPENTER
ESDAILE, BARRETT & ESDAILE
75 Federal Street
Boston, MA 02110
617/482-0333

TRIAL COURT

MIDDLESEX DIVISION PROBATE AND FAMILY COURT DEPARTMENT

JUN 19,1984

The above motion is hereby allowed

s/ ARTHUR G. COFFEY

JUSTICE, PROBATE AND FAMILY COURT DEPT.

DATE: June 8, 1984

Filed March 11, 1984

APPENDIX M

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT
DOCKET #5170

MIDDLESEX, SS.

P B C
PLAINTIFF
v.
D H
DEFENDANT

PLAINTIFF'S MOTION FOR CUSTODY, VISITATION AND SANCTIONS

Now comes the plaintiff in the above-captioned matter who states as follows:

1. The plaintiff believes he is the natural father of N H , the child born to the defendant on June 10, 1982. As detailed in the plaintiff's Verified Complaint and the Affidavit filed therewith, there are numerous bases for the plaintiff's belief and as further detailed in said Complaint and Affidavit, the plaintiff had substantial contact with the child—appropriate to his young age—until the defendant made the decision to move back in with her former husband thereby unilaterally cutting off the plaintiff's further access to the child and causing him to file his Complaint for visitation and custody.

2. The plaintiff's rights *vis a vis* the child rest upon his being found by the Court to be the child's natural father. *Normand* v. *Barkei*, 385 Mass. 851 (1982). For the past nine months, the plaintiff has, therefore, sought access, through timely and proper Court action, to the most probative evidence supportive of his paternity claim: namely, the results of blood tests taken of the child, the defendant and himself so that he can re-establish his relationship with the child.

3. Initially, the Plaintiff's Motion for Blood Grouping Tests was denied by the Trial Court on October 13, 1983. It was denied again after rehearing on November 7, 1983.

4. Given the action of the Trial Court, and the plaintiff's belief that he had the right to discover the blood test results, he petitioned the Single Justice of the Appeals Court for review of the interlocutory order pursuant to M.G.L. C. 231, Sec. 118, and the Single Justice, after hearing arguments of counsel and reviewing the papers in the case, ordered, on January 3, 1984, that the blood tests be granted. The Single Justice perceived a potentially serious constitutional problem if the tests were not allowed—the deprivation to the petitioner of the most probative available evidence for the maintenance of a significant claim and saw no impermissible intrusion on the defendant's constitutional rights by conduct of the test.

5. There followed an appeal to the Appeals Court by H , which after the submission of briefs, was dismissed on May 2, 1984 for lack of jurisdiction based on the Appeals Court's recognition that the appeal was taken from a purely interlocutory order for discovery and not from an injunction granting the substantive relief sought by the Complaint.

6. The defendant then petitioned the Single Justice of the Supreme Judicial Court for relief pursuant to that Court's extraordinary powers of superintendence of lower courts. Said relief was denied on June 7, 1984.

7. The plaintiff then rescheduled hearing of his Motion for Blood Grouping Tests for June 18, 1984. On Friday afternoon, June 15, 1984, plaintiff's attorney received a phone call from the attorney for the child indicating his inability to attend the hearing and as a consequence, all counsel agreed to reschedule the hearing for June 19, 1984. On that date, all counsel appeared and the Court indicated that decision on the motion could be obtained by calling the Court in the afternoon. Plaintiff's counsel called the Court at the indicated time and learned that the blood grouping tests had been ordered by the Court

for June 20, 1984 at 10:15 a.m. at the Center for Blood Research, as requested in the plaintiff's motion. Counsel went to the Court to pick up the copies of the motions on which the allowance was noted and to have said copies hand delivered to counsel for the child and counsel for the defendant, which was accomplished by Minuteman Messenger, Inc. at approximately 4:30 p.m. on June 19, 1984 (see Ex. A.).

8. On the morning of June 20th (the day of the blood tests), the Center for Blood Research called the office of plaintiff's counsel indicating that counsel for the defendant had called the Center late in the afternoon on June 19th, *cancelling the appointments of the defendant and the child for the next day in direct defiance of the order of this Court.* This action of defense counsel occurred despite the Court's twice repeated, clear statements to the defendant at the Motion hearing on June 19th that should the defendant not attend the Court ordered blood tests, the result would be the Court's finding the plaintiff to be the father and granting him visitation with the child. Thus, it was made clear to the defendant and her counsel in their presence by the Court that defendant's failure to obey the Court's blood test order would result in the plaintiff's obtaining the substantive relief he seeks.

WHEREFORE, the plaintiff seeks the following immediate relief:

1. Legal custody of the minor child, N H ;

2. The shared physical custody of the minor child according to the following schedule:

Monday night from 5 p.m. to 8 p.m.; Wednesday overnight from 5 p.m. to 9 a.m.; 7 p.m. Friday night to 6 p.m. Saturday and on alternating weekends 7 p.m. Friday to 9 a.m. Monday.

or, in the alternative, visitation of the minor child according to the following schedule:

Monday night from 5 p.m. to 8 p.m.; Wednesday overnight from 5 p.m. to 9 a.m.; 7 p.m. Friday night to 6 p.m.

Saturday and on alternating weekends 7 p.m. Friday to 9 a.m. Monday.

3. A finding that for the sole purposes of this litigation the plaintiff be declared the natural father of the minor child; and

4. Payment of all costs and attorneys fees of the plaintiff associated with obtaining blood grouping tests supportive of his paternity as detailed in the Affidavit of his attorney filed herewith.

P B C

By his Attorney:

s/ Muriel N. Carpenter

Muriel N. Carpenter
Esdaile, Barrett & Esdaile
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Boston, MA 02110
617/482-0333

DATE: June 29, 1984

85-1183

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

P.B.C.,
PETITIONER,

v.

D.H.,
RESPONDENT.

Brief in Opposition to Petition for Certiorari to the Supreme Judicial Court of Massachusetts On Behalf of Respondent N.H., Minor Child.

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48 pp

Questions Presented.

I. Does due process of law compel the state to create a forum in which the legitimacy of a child conceived by a married woman may be challenged by a stranger to the marriage when the husband of the woman acknowledges the child as his own and the mother and her husband resume living with the child in a family unit?

II. Does the Equal Protection Clause require a state to provide a forum in which a putative father who is not married to a woman may raise the issue of paternity of a child conceived by the married woman when the woman or her husband have not denied the paternity of the husband?

III. Does a family unit consisting of a mother, her husband and a child conceived by the woman during marriage enjoy a constitutional right of privacy which immunizes them from legal compulsion to submit to paternity proceedings and blood testing in an action brought by a stranger to the marriage in a state court?

Parties.

The respondent N.H. child (hereafter referred to as "the child") is the minor child of the respondent D.H. (hereafter referred to as the "the mother"). The petitioner P.B.C. (hereafter referred to as "the petitioner") brought this action against the mother, asking for a declaration that he is the natural father of the child. The child has been and is represented by separate counsel. The husband of the mother (hereafter referred to as "the husband") is not a party to this litigation. The child opposes the petition for a writ of certiorari.

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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

P.B.C.,
PETITIONER,

v.

D.H.,
RESPONDENT.

Brief in Opposition to Petition for Certiorari to the Supreme Judicial Court of Massachusetts On Behalf of Respondent N.H., Minor Child.

Statement of the Case.

Petitioner filed a complaint against the mother in the Massachusetts Probate and Family Court for Middlesex County seeking a declaratory judgment and equitable relief, specifically seeking a determination that he is the natural father of the child. An independent attorney was appointed to represent the child, and the child has thereafter participated in all stages of this litigation through counsel.

The petitioner filed a motion to require the mother and the child to submit to a Human Leukocyte Antigen (HLA) white blood cell test, and mother and child were ordered to submit to such a test after various proceedings. The mother then filed a motion to dismiss which was denied by a judge of the Massachusetts Probate and Family Court (App. III at 22a). The same judge then ordered the mother and child to submit to the HLA blood test within thirty days, and stated that if the mother did not comply with this order the judge would consider imposing various sanctions, including prohibiting the mother from presenting any evidence at trial, incarceration and/or the assessment of daily costs (App. III at 22a).

The mother sought leave to file an interlocutory appeal, and the Supreme Judicial Court of Massachusetts granted direct appellate review. The Supreme Judicial Court reversed and remanded, ordering the Probate and Family Court to dismiss the complaint (App. II at 17a). In doing so, the Supreme Judicial Court treated the mother's motion to dismiss as a motion for summary judgment (App. II at 11a) and considered the following facts from the pleadings, affidavits and briefs filed by the petitioner, the mother and the child as to which there was no controversy (App. II at 11a):

1. The mother and the petitioner had a sexual relationship prior to September, 1981 while she was married to her present husband.

2. The mother filed a complaint for divorce in May 1981.

3. The child was conceived in September, 1981.

4. A divorce judgment nisi was entered on December 8, 1981.

5. The divorce became final on June 9, 1982.

6. The child was born one day after the divorce became final, on June 10, 1982.

7. The birth certificate lists the husband of the mother as the father of the child.

8. The child lived with the mother at all times after its birth and never lived with the petitioner.

9. Since September, 1983 the mother has not allowed the petitioner access to the child.

10. The mother remarried her husband on September 12, 1983.

11. The petitioner filed his complaint on September 6, 1983.

12. The husband never denied that he was the father of the child.

13. Since September 1983 the mother, the husband and the child have lived together continuously as a family, together with an older child of the mother and her husband.

The Supreme Judicial court held that the mother was entitled to summary judgment. A child conceived by a married woman is presumed to be the child of the man to whom she is married, even if the woman and her husband are divorced at the time of the child's birth. This rule was said by the Massachusetts court to foster the important social policy of affording legitimacy to children whenever possible (App. II at 14a).

Recognizing that Massachusetts law permits the rebutting of the presumption of legitimacy only on facts which prove beyond all reasonable doubt that the husband could not be the father of a child conceived or born to his wife, the court ruled that a stranger to the marriage is not in the same position as the mother and her husband to challenge the legitimacy of the child because the mother and her husband "constitute a family unit." (App. II at 16a.) A challenge to the husband's paternity brought by a stranger in the circumstances of this case has "the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth." (App. II at 16a.)

Statement of Facts.

The petitioner has included in his petiton for a writ of certiorari numerous allegations of fact which were not considered by the Massachusetts Supreme Judicial Court in its determination that the mother was entitled to summary judgment. In an affidavit filed with the Massachusetts Probate and Family Court the mother under oath denied many of these allegations, specifically stating that she never had sexual relations with the petitioner after August, 1981 (App. I at 3a); that she resumed sexual relations with her husband in August, 1981 (App. I at 3a); that she had sexual relations with her husband on September 5, 1981, at which time the child was conceived (App. I at 3a); that the mother and her husband decided to let the divorce proceedings continue and then re-marry in order to avoid further "involvement with legal proceedings" and the petitioner who had obtained as legal counsel for the mother the same law firm which handled his divorce (App. I at 2a, 4a); that at the time of the divorce becoming absolute and the birth of the child the mother and her husband were living together as husband and wife and holding themselves out as a family unit (App. I at 4a); that on the birth of the child the husband acknowledge the child as his own and thereafter the mother, her husband and the child continued to live together as a family (App. I at 4a); that the mother informed petitioner he was not the father of the child (App. I at 4a); that the mother never asked petitioner to support the child (App. I at 5a); that petitioner made continuing efforts to disrupt the mother's relationship to her husband and family (App. I at 6a); that the mother rented an apartment from the petitioner in Lexington, Massachusetts, in order to have access to the school system in that town, and that her husband frequently stayed there and continued to provide support for both children (App. I at 6a); that petitioner's only contact with the child was through the fact that his daughter served as a babysitter for the child (App. I at 6a);

that since September, 1983 the mother and her husband have lived as a family unit with the child and his older sister and that the family relationship has "flourished" (App. I at 7a); and the litigation instituted by the petitioner has taken a great toll on the wife and her husband "emotionally and financially" (App. I at 8a).

Because many of the allegations made by the petitioner in his complaint, affidavit and briefs in the proceedings below (which are now realleged in the "Statement of Facts" contained his petition for a writ of certiorari filed in this Court) are disputed by the affidavit and pleadings filed by the mother, the Supreme Judicial Court of Massachusetts made no assumptions as to these facts in controversy. The Massachusetts court noted that "[r]esolution of the controverted facts would not affect our decision" (A. II, n.1 at 11a).

Reasons for Denying the Writ.

I. No Plausible Due Process Analysis Can Be Made in the Circumstances of this Case for Granting Relief to the Petitioner and No Novel and Important Due Process Issue Is Raised by the Petition.

Petitioner contends that the grant of summary judgment to the respondent mother in the paternity proceeding below by the Massachusetts court denied him due process of law. He argues that as a putative father he has the right to a hearing on his claim that the respondent child was fathered by him, and that his petition presents a substantial federal question (Petition 7). He argues that the Supreme Judicial Court of Massachusetts created a "conclusive presumption preventing a natural father from asserting his patenrity in any case where

the mother was married at the time of conception" (Petition 7). Petitioner also contends that what he characterizes as a "conclusive presumption" (Petition 7) would preclude a paternity claim in the Massachusetts courts by a man when a child is conceived by a married woman even if the man supports the child, lives with the child in his formative years, and even if the mother dies (Petition 7).

The problem with the petitioner's analysis of the Massachusetts decision in this case is that it far overstates what the Supreme Judicial Court actually decided. The decision in the state court was rendered on a motion to dismiss treated as a motion for summary judgment under the Massachusetts Rules of Civil Procedure. The uncontroverted facts on which the Massachusetts court decided this case are far removed from the various hypothetical horribles cited in the petition.

The opinion of the Supreme Judicial Court of Massachusetts below makes it perfectly clear that the court held on the summary judgment issue that "*in the circumstances of this case* a man does not have a constitutional right to an adjudication of whether he is the father of a child conceived when the mother was married to another man" (App. II at 16a) [emphasis added]. Isolated dicta and quotes from the Massachusetts decision may make the opinion appear broader than it actually is, but it cannot be denied that the decision itself turned on the narrow legal and factual issues raised by the summary judgment motion.

The operative and uncontroverted facts on which the Massachusetts court decided the summary judgment question included the fact that the respondent mother was married to another man at the time of conception. But they also included other critical uncontroverted facts which are not emphasized in the petitioner's due process analysis. These include the fact that the birth certificate lists the husband of the woman as the father of the child, that the child never lived with the petitioner,

that the mother remarried the husband after the birth of the child, that the husband never denied he was the father of the child and that the mother, husband, child and another sibling have lived as a family unit since September, 1983.

It requires an indefensible leap of imagination on a record such as this to argue that in granting summary judgment on the facts set out in this record the Massachusetts court thereby created a "conclusive presumption" (Petition 7) that *every* putative father would be denied a forum for establishing paternity of *any and every child* conceived by a married woman regardless of the circumstances. Simply stated, the petition for a writ of certiorari misstates what the Massachusetts court actually did when it granted summary judgment "in the circumstances presented by this case" (App. I at 16a). The sweeping constitutional arguments set forth in support of the petition do not relate to the facts, the issues or the applicable law and procedure employed in the proceedings below.

The precedents cited by the petitioner in support of the proposition that he was denied the opportunity to be heard on a liberty interest do not support his conclusions. The cases cited in his due process analysis in the petition, deal with a radically different factual setting from those which confronted the Massachusetts court on the summary judgment issue. *Lehr* v. *Robertson*, 463 U.S. 248 (1983); *Quilloin* v. *Walcott*, 434 U.S. 246 (1978) and *Caban* v. *Mohammed*, 441 U.S. 380 (1979) deal with the rights of putative fathers of illegitimate children to notice and an opportunity to be heard before the child is adopted by a stranger. *Santosky* v. *Kramer*, 455 U.S. 745 (1982) deals with the rights of parents in parental termination proceedings. *Stanley* v. *Illinois*, 405 U.S. 645 (1972) deals with the procedural rights of the father of illegitimate children, who has had custody of the children and cohabited with the mother, to a hearing before the children are removed from his custody after the death of the mother. *Smith* v. *Organi-*

zation of Foster Families for Equality and Reform, 431 U.S. 816 (1977) deals with the removal of children from foster homes. Unlike the constitutional issues addressed in these decisions, this case focuses on the rights of a stranger to the marriage to challenge the legitmacy of a child conceived by a married woman, accepted by her husband as his child and cohabiting with his mother and her husband. This case is not different merely in degree from the various precedents cited by petitioner, but differs radically in kind.

In citing *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), petitioner argues that he has a due process right to a hearing on his paternity claim. He asserts that every state court which has considered this issue has "mistakenly applied" (Petition 13) the *Roth* principles in cases involving the paternity claims of putative fathers when the mother is married to another person (Petition 13-14 and cases noted therein).

Petitioner notes that *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) [involving the due process rights of an untenured teacher], and the principles which have developed from it, requires an examination of the nature of the interest at stake rather than a mere weighing of the interest in determining due process requirements. It is the nature of interest which determines due process rights. But this is the very rock on which petitioner's ship flounders. The interests of the father of an illegitimate child living in his home, the problem addressed in *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (on which petitioner's argument is in great part premised), differ not just in degree but in kind from the interests of a putative unmarried father in a legitimate child living in a home with a mother and her husband. The interests protected in *Stanley* reflect a stable home environment for children and a history of association with and support for children during their formative years which is entirely lacking in the factual history on which the Massachusetts court granted summary judgment in this case.

The petitioner's claim is different not merley in weight but in kind from the claim of Mr. Stanley not to have his children taken from him without a hearing.

Unlike the children in the other decisions of this Court cited by the petition for a writ of certiorari, the child in this case was conceived by a married woman, acknowledged by her husband, and is living in a stable home environment with the mother and her husband. As the Supreme Judicial Court decided below this is a legitimate child under Massachusetts law, whose legitimacy the petitioner wishes to challenge. Petitioner places great stress on the Supreme Judicial Court's weighting of the state's interest in strengthing and encouraging of family life and legitimacy, arguing that this constitutes an impermissible pre-hearing weighing of petitioner's interest. This characterization misstates what the Massachusetts court decided. The observations of the Massachusetts court about family life and legitimacy are directed not at weighing the interests of the petitioner but at the very nature of his claim. The nature of his claim cannot be separated on a summary judgment motion from the uncontroverted facts of the case as they appeared to the court at the time of the motion. Petitioner's claim strikes at the very heart of the family stability and legitimacy of a child who lives with his mother and her husband. This is radically different in kind from a paternity claim asserted by the putative father of an illegitimate child with whom the father has a history of association and support. To argue that a claimant in the circumstances of the petitioner is entitled by due process of law to disrupt an existing family unit by challenging family stability and legitimacy is to assert a *new and radically different kind of claim* from anything previously know in American constitutional law.

II. In Granting Summary Judgment in the Circumstances of this Case Massachusetts Has Not Denied Equal Protection of the Law.

Petitioner argues that a writ of certiorari should issue because Massachusetts has created an impermissible classification burdening natural fathers, which deprives petitioner and others like him of equal protection of the law (Petition 17). This gender discrimination argument is said by petitioner to turn on different treatment accorded to natural mothers and natural fathers (Petition 17-18).

In substantial part this equal protection argument is based on a re-hashing of the due process arguments discussed *supra*, i.e. that petitioner should have standing to maintain an action of paternity. As in the due process argument the petition largely ignores most of the uncontroverted thirteen facts which were before the Massachusetts court on the summary judgment motion and goes off on a constitutional analysis of interests of the fathers of illegitimate chidren as previously examined in cases such as *Caban* v. *Mohammed*, 441 U.S. 380 (1979) and *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

To the extent that the petition states a true gender-based discrimination argument it turns on the fact that the mother of a legitimate chid (as that is defined under state law on the facts of this case which were before the court on the summary judgment motion) may institute a paternity proceeding against a man while a putative father may be denied the opportunity to contest the legitimacy of a legitimate child living with a woman and her husband.

This Court has held that for a gender-based classification to meet constitutional demands of equal protection it must serve an important governmental objective and be substantially related to the achievement of that objective. *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981); *Wengler* v. *Druggists Mutual*

Ins. Co., 446 U.S. 142 (1980); *Orr* v. *Orr*, 440 U.S. 268 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Craig* v. *Boren*, 429 U.S. 190 (1976), *reh. den.*, 429 U.S. 1124 (1977); *Stanton* v. *Stanton*, 421 U.S. 7 (1975). However, the burden of establishing such a state objective exists only when the state has in fact imposed a gender-based classification. The categories in issue are described by petitioner as being those of "natural fathers" and "natural mothers," (Petition 18). However, the actual categories are "mothers" and "putative fathers." Mothers and putative fathers are distinguishable categories in law because of the simple fact of biology. Except possibly in some relatively rare instances involving embryo transfer, *in vitro* fertilization and other applications of embryo technology, the issue of the mother's biological relationship to the child she bore is not in any legal or factual doubt. The Supreme Court of Wyoming has aptly and properly described this legal and factual reality in rejecting a gender discrimination argument by a man who sought to establish that he was the father of a child born to a married woman:

> The classification here made is not "entirely unrelated to any differences between men and women." The differences are the very foundation of the classification. Here, they are obvious. The woman carries the child through pregnancy. When born of her, the fact of motherhood is obvious. Not so the man. The proof of fatherhood, or the proof of lack thereof, must come from an external source. The entire classification . . . is premised on this basic and obvious distinction, it is not invidious, but "realistically reflects the fact that the sexes are not similarly situated" in the circumstances. Men do not bear children and give birth to them.

A v. *X, Y and Z*, 641 P.2d 1222, 1225 (Wyo. 1982).

The petitioner's categories of "natural fathers" and "natural mothers" ignores the simple and obvious fact that nature itself dictates the disperate treatment accorded to each under the law. In the context of legal disputes involving human reproduction this Court has consistently recognized this obvious proposition. In *Roe* v. *Wade*, 410 U.S. 113, *reh. den.*, 410 U.S. 959 (1973), this Court recognized that the peculiar circumstances of pregnancy created a constitutional right in a woman to abort a fetus during the first trimester of pregnancy free of interference by the state; in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), this Court precluded the imposition of a veto power over the abortion by the natural father of the child. Other courts have applied this distinction between the situations of the mother and the father in circumstances which demonstrate the power of the dictates of biological fact over the power of law. For example, in *People in Interest of S.P.B.*, 651 P.2d 1213 (Colo. 1982), the court ruled that equal protection was not denied to a natural father who was obligated to support a child when the woman carried his child to term notwithstanding his demand that she have an abortion. So also in the context of paternity proceedings, the law is justified in classifying mothers whose maternity is never in doubt from fathers whose paternity may be open to question. Biological fact dictates such a distinction, and the law is helpless to change the structure of nature.

III. The Family Enjoys a Right to Privacy Against Legal Compulsion to Submit to Paternity Proceedings and Blood Testing in an Action Brought Against its Members by a Stranger.

Counsel for the child argued in the Massachusetts courts that "family interests and concerns are entitled to constitutional protections" (Brief for the child in the Massachusetts Supreme

Judicial Court), and here argues that such constitutional protections for the family unit is reason to deny the writ of certiorari. While not phrased in clear constitutional terms, it is clear from reading the opinion of the Supreme Judicial Court that the Massachusetts court was acting to protect and promote the family interests of the respondents when it granted summary judgment on the basis of the uncontroverted facts, *supra*.

"A challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth" (App. II at 16a). The familly involved in this case has had to live with the burden of this lawsuit since the filing of the complaint in September, 1983, and it is time to remove this burden and end this litigation by denying the petition.

The weight of this burden is apparent from this record. The mother and child were ordered by the trial judge to submit to blood testing, under threat of being prevented from presenting evidence, the jailing of the mother "until she agrees to comply with the order" and the imposition of "daily costs" (App. III at 22a).

The integrity of the family unit has found constitutional protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (right to raise one's children deemed essential), *Moore* v. *East Cleveland*, 431 U.S. 494 (1977) (right of family to choose living arrangements), the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (marriage and procreation among the basic civil rights of man), *Loving* v. *Virginia*, 388 U.S. 1 (1967) (freedom to marry a vital personal right essential to the orderly pursuit of happiness by free men), *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (right to marry is protected under doctrine of privacy), the First Amendment, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (right of parents to educate their children), and the Ninth

Amendment, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring) (right of husband and wife to freely make contraceptive choice). Privacy is implicit in the First Amendment's freedom of association, *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Indeed, the zone of the family's privacy has been said by this Court to emanate generally from the specific guarantees of the entire bill of rights, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). "The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right," *Poe* v. *Ullman*, 367 U.S. 497, 551-552, *reh. den.*, 368 U.S. 869 (1961) (Harlan, J., dissenting; cited with approval in *Griswold* v. *Connecticut*, *supra*).

This Court has recognized the family as the most fundamental social institution of our society, *Trimble* v. *Gordon*, 430 U.S. 762, 769 (1977). It has consistently acted to protect the "private realm of family life which the state cannot enter" *Prince* v. *Massachusetts*, 321 U.S. 158, 166, *reh. den.*, 321 U.S. 804 (1944). It would be hard to conceive a greater intrusion by the use of state judicial power into the privacy of the family than the one advocated by the petitioner in the present case. On summary judgment the state supreme court has found as uncontested fact that the child has been conceived by a married woman, acknowledged by her husband, and is being raised by the husband and wife in a family unit. Yet the petitioner seeks to contest the legitimacy of that child, and to compel the mother and child to submit to blood testing against their wills. A judge has indicated that he will consider jailing the mother if she does not submit to the blood testing. If the petitioenr prevails he will be using the judicial power of the state to intrude into the privacy of the family, threatening the tranquillity, peace and unity of the family. In her affidavit the

mother described the "great toll on us, emotionally and financially" caused by this litigation (App. I at 8a). It is time to end this emotional and financial drain on the family and deny the petition.

Conclusion.

In the circumstances of this case, no plausible due process analysis can be made for granting relief to the petitioner, and no novel and important due process issue is raised by the petition. In granting summary judgment, the Supreme Judicial Court of Massachusetts has not created any gender based classification between natural mothers and putative fathers. Further, many of the allegations of fact relied upon by the petitioner were not considered by the Supreme Judicial Court and were in fact denied by the mother in an affidavit under oath filed in the Massachusetts Probate and Family Court. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix I.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. PROBATE COURT
DOCKET NO. 5170

D.H.,
Petitioner

VS. AFFIDAVIT OF THE PETITIONER D.H.

P.B.C.,
Respondent

I, D.H., hereby affirm that the following facts are true to the best of my knowledge and belief:

1. In September, 1972, I met W.W.H. (Bill) at Gordon College in Wenham, Massachusetts, where we were both students.

2. In May, 1974, Bill graduated from Gordon College and I shortly thereafter, in September, 1974, began nursing school at the Malden Hospital School of Nursing.

3. Bill H and I were married in March, 1975 and we moved into an apartment at Street in Malden, Massachusetts.

4. On November 17, 1977, W and I had our first child, B L H.

5. In July, 1978, Bill began a full-time graduate program at Boston University. I began working full-time as a nurse to help support our family.

8. In January, 1979, I began working at a new job as a nurse at the Whidden Hospital in Everett, Massachusetts.

7. In July, 1979, I was transferred to the emergency department of the Whidden Hospital.

8. In August, 1979, I was introduced to Dr. PBC who was a supervising physician in the emergency room at the Whidden Hospital.

9. Late in 1979 and early in 1980, Dr. C and I became friends. He made repeated efforts to develop a romantic relationship; however, I refused his repeated offers. We did become friends, and during that period he began to tell me many details about his divorce. In March, 1980, while Bill and I were having disagreements, C encouraged me to see Eve Welts, a social worker who had counselled with C during his divorce. C told me that he thought he thought Eve Welts could help me to work through my disagreements with my husband Bill, whether that meant separation or reconciliation. Also, in March, 1980, C strongly encouraged me to see Attorney David Lee who had counselled C through his divorce. C stated at that time that if I did not take some sort of legal action, and my disagreements with Bill continued, that Bill might remove our child from the area. I did see C's attorney, David Lee, and was informed that I did not need to take any legal action.

10. In May, 1980, after five years of marriage, Bill and I separated. Bill continued his studies at Boston University and began working full time at the Fernald School, while I continued in my capacity as a nurse at the Whidden Hospital. Bill and I continued to maintain contact and to mutually care for our daughter, B.

11. In July, 1980, while Bill and I were separated, I entered into a physical relationship with Dr. C. He had made many attempts to start one earlier, but I had refused. During this time, he enlisted my help with his children from a previous marriage who were in the custody of his ex-wife, RC. During this time, I did help with his children by visiting them, and became friends with his children. At the same time I was continuing with my husband, Bill, to mutually care for our daughter, B.

12. In February, 1981, my husband, Bill, discontinued his studies at Boston University to take on a second job. He began giving me additional money to help support our daughter, B. Bill and I continued to meet very regularly to do things as a family with our daughter, B.

13. In May, 1981, Bill and I had an argument about his being late picking B up for an overnight stay. Dr. C, at that point, urged me to leave B at C's house while I met Bill, "to teach him a lesson." C had been encouraging me for over a year to obtain a divorce from my husband, Bill, and on this night in May, 1981, C again urged me to see his attorney, David Lee, once again to obtain a restraining order against Bill and to take action toward a divorce. The next morning I met with attorney Bill Levine, an associate of attorney David Lee. Attorney Bill Levine stated that in addition to obtaining a restraining order it would be advantageous to file for a divorce. That afternoon, attorney Bill Levine and I appeared in Cambridge to obtain a restraining order and to file for a divorce, upon C's urging.

14. In August, 1981, my husband Bill and I began a process of reconciliation. In that same month of August, I terminated my relationship with Dr. C, never having relations with him again. Late one weekend in August, my daughter, B and I spent a weekend camping in Salisbury with my husband, Bill, and Bill and I resumed all aspects of our marriage relationship.

15. In September, 1981, Bill and I began staying together on a regular basis, and continued to have relations which we had resumed in August, 1981. On September 5, 1981, he took me out for my birthday and we spent that night together. It was on that night that we believe our son, N, was conceived.

16. In November, 1981, I told my husband Bill that I was pregnant, and we decided that we should live together and, after making arrangements, Bill moved in with me in December, 1981.

17. During this period, Bill and I discussed whether to let the divorce proceedings continue or whether to terminate the divorce proceedings. We decided to let the divorce go through because we thought it would be much easier to simply let the proceedings continue and get remarried, rather than to stop the proceedings through our attorneys. It had been a very stressful period of time since I had filed for a divorce at C's urging, and Bill and I did not wish to have any more involvement with the legal proceedings or with C.

18. In January, 1982, C called me, begged me to meet him, and asked me to meet him at a Howard Johnson's restaurant to talk. I met with him at the restaurant and told him that Bill and I were living together again, that our relationship was well, and that I was happy, and that I did not want to see C again. During this period of time, I was continuing to have contact with C's daughter, L, whom I had befriended in the previous year. However, I never, during my conversations with L, asked to meet C, and never asked L if I could meet her at C's house.

19. On June 9, 1982, the divorce decree between Bill and I became absolute. At the time, Bill and I were living together as husband and wife, holding ourselves out as a family unit with our daughter, B. At the time, we were not aware that the divorce decree had become absolute.

30. On June 10, 1982, our child, NWH, was born. His birth certificate lists my husband, WWH and myself, as the parents. At the time of N's birth, WWH acknowledged N as his child, we acknowledged ourselves as the parents of N, and continued to live together as a family.

21. In August, 1982, Dr. C's daughter, L, invited me for a visit. While I was there, Dr. C came home and stated that he was forty-one years old, and he wanted to die. When I asked him why, he refused to discuss it. He also asked if N was his child, and I told him no. He stated that he didn't think

he was. C stated he loved me, missed me, and began pressuring me to see him again. I did not want that, as Bill and I were living together again, and had resumed our family relationship. C continued to pressure me, however, and I became confused. At the time, I was experiencing post-partum depression and, as a result of the additional pressure applied by C, I began to see the only social worker with whom I had any prior experience, Eve Welts, whom I had met two years previous through Dr. C. After several sessions with Eve Welts, I refused to attend any further sessions because I felt both Eve Welts and Dr. C were encouraging me to resume my relationship with Dr. C. I did not want to continue that relationship, I loved Bill. Eve Welts did not appear sensitive to my feelings, and seemed to be aligning herself with Dr C; therefore, I discontnued counselling sessions.

During this time, in August, 1982, Dr. C became concerned about any possibility that he was N's biological father. He did not want anyone to know about our previous relationship, and did not want anything to do with N. He made me promise that I would never sue him for paternity. He never once mentioned having blood tests done. I never asked him for child support. There were no planned visits between N and C. C did see N on occasion when I was visiting C's children with whom I did have a good relationship; however, such occasions were rare, and I never intended nor wanted N to have any exposure to C for various reasons.

22. C's efforts to draw me away from my husband, Bill, and to interfere with our family relationship continued throught [*sic*] the spring of 1983. During that period, Bill and I decided that we would move out of Malden as we were looking for additional living space as a family, and we wished to find what we thought would be a better school system for our daughter, B, who was about to enter first grade in September. I wanted to live in Lexington because of the quality of the school

system, and also because Bill and I attended church at Grace Chapel in Lexington. Bill felt that Lexington was too far away for his business. Bill and I were unable to come to any agreement regarding a town, and, I therefore, had decided that I would attempt to rent an apartment in Lexington hoping that Bill would find it to be a desirable area and a convenient are, [*sic*] and therefore, change his mind about buying a house there.

23. During this period of time, in the spring of 1983, Dr. C upon hearing that I was looking for a place to live, offered to take me to a realtor in Lexington who was a friend of his, and who had sold him a house in the past. That realtor, Couette Realty, suggested that Dr. C buy a house as an investment, and rent me the house or a portion of it. Dr. C purchased a house in Lexington, with plans of converting it into an illegal two-family house, and agreed to rent me that house for $650.00 per month.

24. In June, 1983, I moved into the house in Lexington. Bill helped me to move into the house. While Bill and I disagreed as to where we ought to be living, we continued to work on provided [*sic*] a family home environment for the children. Bill, at that time, continued to provide financial support for both our children, and Bill also stayed at the house very frequently.

During the initial month I was living in Lexington, Dr. C attempted to intrude upon my family relationships, and attempted to exercise some control over me as my landlord. C would drive by the apartment late at night, complain to me later about Bill and I continuing to live together, and attempt through various means to have access to my children, B and N. Bill and I avoided these efforts by C, wanting to protect our children, B and N, from contact with C. We did have a close relationship with C's daughter L, and she continued to baby-sit for B and N. Infrequently, L would request to baby-sit at her own house for her convenience, so I brought a crib and a portable

high chair, which Bill and I had purchased for N, over to L's house for her to use in caring for N along with toys for both children. This continued until L moved back with her mother.

25. After living in Lexington for approximately one month, I realized that I had made a mistake, and that Bill was not going to change his mind about locating permanently in Lexington. Bill and I began to discuss the possibility of buying a house in another town, specifically, Wakefield, and in late July began looking for a house in that town. At that point, Dr. C became concerned about my intention to move away from Lexington, and C asked me to refrain from paying him the agreed upon $650.00 per month rent, stating that he would deduct it from the $2,000.00 I had loaned him to purchase the house. Dr. C also became much more persistent in his efforts to interfere with the family relationship that Bill and I were enjoying.

26. In August, 1983, Bill and I went on a vacation together. We had made our decision to relocate, and we had also decided to remarry in the fall.

27. Two weeks later, Dr. C filed a lawsuit against me and served me with restraining orders. I immediately moved back to Malden with Bill and our children, intending to remain there until Bill and I were able to purchase a house in Wakefield.

28. On September 12, 1983, Bill and I remarried.

29. On November 10, 1983, we purchased a two family house in Wakefield.

30. Bill and I have had a very good, solid, loving and caring relationship both during our previous marriage and since our reconciliation in August, 1981. Our relationship and our family relationship has especially flourished since our remarriage in September, 1983 and our move to Wakefield. Our marriage has never been stronger. We would like to have another child, but feel we should wait until the Court proceedings in this case have been resolved.

This Court case has taken a great toll on us, emotionally and financially. I believe that Dr. C. has taken this action out of revenge and malice as demonstrated by his actions and as demonstrated by the fact that he never acknowledged Nathaniel as his child or attempted to assert any claim to paternity for over fifteen (15) months following Nathaniel's birth. He only began to assert any claims to paternity after he realized that Bill and I were going to remarry in September, 1983.

Signed under the Pains and Penalties of Perjury, this 13th day of July, 1984.

/s/_____

D.H.

Appendix II.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

P.B.C. *vs.* D.H.
Middlesex, May 8, 1985.—October 10, 1985.
Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & O'CONNOR, JJ.

CIVIL ACTION commenced in the Middlesex Division of the Probate and Family Court Department on September 6, 1983.

A pretrial motion was heard by *Edward M. Ginsburg*, J.

Leave to file an interlocutory appeal was granted in the Appeals Court by *John M. Greaney*, C.J.

The Supreme Judicial Court ordered direct appellate review on its own initiative.

Steven I. Dean for the defendant.

Malcolm M. Donahue for the minor.

Muriel N. Carpenter for the plaintiff.

O'CONNOR, J. The plaintiff in this case contends that he has a right to an adjudication of whether he is the father of a child conceived while the child's mother, the defendant, was married to another man. We hold that in the circumstances of this case he has no such right.

The complaint, filed in the Probate and Family Court, requests that the court declare the plaintiff to be the natural father of the child and that he be granted custody of the child, or, if not custody, then visitation rights. The plaintiff moved that the court order that he, the mother, and the child submit to a

Human Leukocyte Antigen (HLA) white blood cell test. A judge denied the motion. Thereafter, there were proceedings in the Appeals Court and before a single justice of this court, as well as further proceedings in the trial court, resulting in the allowance of the plaintiff's motion and an order that the plaintiff, the mother, and the child submit to the test on a specified date.

When the mother and the child failed to submit to the test, a judge of the trial court imposed sanctions by ordering that the mother would be deemed to have made certain concessions favorable to the plaintiff's claim. The plaintiff then moved that the case be scheduled for trial, but, before a trial date was assigned, the mother moved to dismiss the complaint on the ground that the plaintiff lacked standing to litigate the question of his paternity. Taking into account the earlier proceedings relative to the blood test, an affidavit that had been filed by the plaintiff, and certain "undisputed evidence," a judge concluded that allowance of the motion to dismiss at that time was inappropriate, and he denied the motion. At the same time, he ordered the mother and the child to submit to the HLA test. The order provided that the possible consequences of noncompliance would be preclusion of the mother from offering evidence at trial on the issue of paternity, incarceration until she complied with the order, and assessment of "daily costs" against her.

The next procedural step was that the mother filed in the Appeals Court a petition for review of the denial of her motion to dismiss the complaint. A single justice of that court reasoned that if the test were administered and showed that the plaintiff was the child's natural father, and if then, on appeal, it was decided that the plaintiff had no standing to assert his paternity, serious and longlasting emotional damage might unnecessarily be caused to the child. Accordingly the single justice authorized an interlocutory appeal to the Appeals Court from the denial

of the mother's motion to dismiss the complaint, and he ordered a stay of further proceedings in the trial court. We transferred the case to this court on our own initiative. We remand the case to the Probate and Family Court for the entry of an order dismissing the complaint.

The trial judge and the single justice of the Appeals Court relied on matters outside the pleadings in making their rulings. The parties, too, in their briefs on appeal, rely on facts not pleaded. Therefore, we treat the motion to dismiss as a motion for summary judgment, and we consider the facts to be those expressly or impliedly set forth in the pleadings, affidavits, and briefs of the parties, and about which there appears to be no controversy.

Those facts are as follows. For an extended period of time before September, 1981, while the mother was married to another man, the mother and the plaintiff had a sexual relationship.[1] The mother filed a complaint for divorce in May, 1981. The child was conceived the following September. A judgment of divorce nisi was entered on December 8, 1981. The divorce became final on June 9, 1982, and the child was born the next day. The child has lived with the mother since birth and has never lived with the plaintiff. Since September, 1983, the mother has not allowed the plaintiff access to the child. The complaint in this case was filed on September 6, 1983, and after that the mother and her former husband remarried.

By affidavit and in her brief the mother asserts other facts which the plaintiff appears to concede. Those facts are that her remarriage to her former husband occurred on September 12, 1983, the child's birth certificate lists her husband as the

[1] The parties dispute whether their sexual relationship continued into September, October, and November, 1981. They also dispute the extent to which the mother and her husband lived together between late 1981 and the summer of 1983. We make no assumptions as to those facts or other facts in controversy. Resolution of the controverted facts would not affect our decision.

father, the husband has never denied his paternity, and since September, 1983, the mother, her husband, the child in question, and an older child of the mother and her husband have lived together continuously. We make those assumptions.

This court has held that a child *born* to a married woman is presumed to be the child of the mother's husband. *Commonwealth* v. *Leary*, 345 Mass. 59, 60 (1962). That presumption of legitimacy may not be rebutted, even in a civil case, "except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father." *Phillips* v. *Allen*, 2 Allen 453, 454 (1861). We hold today that a child *conceived* by a married woman is presumed to be the child of the man to whom the mother was then married even if the mother and the husband are divorced at the time of the child's birth. Our holding fosters the important social policy of affording legitimacy to children whenever possible. See *Powers* v. *Steele*, 394 Mass. 306, 310 (1985); *Green* v. *Kelley*, 228 Mass. 602, 605 (1917). The plaintiff has not urged us to hold otherwise. He simply argues that he should be permitted to rebut that presumption.

Here, the mother was married at the time the child was conceived. The child, therefore, is presumed to be the husband's child. Although we have held that the presumption of legitimacy may be rebutted, and we have defined the burden of proof in that regard, we have never confronted the question whether the presumption may be rebutted by a man claiming to be the child's natural father. Nor does any statute answer the question.

The question was not before us in *Normand* v. *Barkei*, 385 Mass. 851, 853 (1982), on which the plaintiff relies as support for his contention that he has a right to prove that he is the child's father. *Normand* v. *Barkei, supra,* sheds little light on the issue before us because in that case the children's mother was unmarried when the children were conceived and were

born. There was no question of legitimacy. The plaintiff simply sought an order granting him visitation rights with respect to two children unquestionably illegitimate, that he claimed were his children.

We must decide for the first time, then, whether, in the circumstances of this case, a man is constitutionally entitled to a judicial determination of whether he is the natural father of a child conceived while the mother was married to another man. We conclude that he does not have that constitutional right. We further conclude, as a matter of public policy, that in the circumstances of this case we should not recognize in the plaintiff a common law right to a paternity adjudication.

The plaintiff contends that denying him the opportunity to establish his paternity would deprive him of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. He relies on *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In that case, the Supreme Court stated, "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id* at 651. An understanding of the meaning and limits of that statement is aided by an appreciation of the context in which the statement was made. *Stanley* involved an *acknowledged* father's efforts to prevent his children from being declared wards of the State upon the death of their mother with whom Stanley had intermittently lived for eighteen years. At the time of the conception and birth of the children, the mother was unmarried, as was Stanley. Unlike this case, no presumption of legitimacy was involved. An Illinois statute, conclusively presuming that a father of an illegitimate child is an unfit parent, provided that upon the mother's death the child would automatically become a ward of the State. Focusing on the "cognizable and substantial" interest of a man in the children "he has sired and raised," the Supreme Court held that the conclusive presumption deny-

ing Stanley a right to be heard on his fitness as a parent violated Stanley's right to due process. *Id.* at 649-652.

We continue to recognize, as we did in *Normand* v. *Barkei*, *supra*, that ordinarily and unwed father has a legally protectable interest in his children, and that he is entitled to establish that he is their natural father. But it does not follow, and *Stanley* v. *Illinois*, *supra*, does not require, that, in all circumstances, a man claiming to be the father of a child conceived while the child's mother is married to another man is constitutionally entitled to be heard on the question of paternity.

As the plaintiff recognizes in his brief, "the guaranty of due process. . .demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934). The Commonwealth has legitimate and strong interests in "the strengthening and encouragement of family life for the protection and care of children." G.L. c. 119, § 1 (1984 ed.), and in affording legitimacy to children. *Powers* v. *Steele*, 394 Mass. 306, 310 (1985). Denying a plaintiff the right to establish his paternity in the circumstances of this case promotes those interests. Not only was the child's mother married to a man other than the plaintiff when the child was conceived, but also the husband (the presumed father) has never denied that he is the child's natural father. Furthermore, the child's mother and the presumed father have been remarried almost since the filing of the complaint herein, and, since that time, they have continued to maintain a family unit which includes the child. Although appropriate social policy might be clearer if the marriage had been uninterrupted since the child was conceived, we are satisfied that, in the circumstances obtaining here, denying the plaintiff a right to litigate his paternity bears a substantial relationship to the aforementioned interests of the Commonwealth, and, therefore, does not violate the plaintiff's

right to due process. Here, unlike in *Stanley* v. *Illinois, supra*, there is a "powerful countervailing interest" that justifies withholding the relief the plaintiff seeks. Our holding finds support in other jurisdictions. See *Vincent B.* v. *Joan R.*, 126 Cal. App.3d 619, 624-627 (1981); *Petitioner F.* v. *Respondent R.*, 430 A.2d 1075, 1078-1079 (Del. 1981); *A.* v. *X, Y, and Z*, 641 P.2d 1222, 1226-1227 (Wyo. 1982).

The plaintiff's constitutional argument is not limited to the due process clause of the Fourteenth Amendment. He relies also on the Fourteenth Amendment's equal protection clause and on art. 106 of the Amendments to the Constitution of the Commonwealth (the Equal Rights Amendment). The plaintiff's sole argument regarding these constitutional provisions is that to deny him the right to seek an adjudication of his paternity while allowing the child's mother to do so[2] is to establish classifications based on sex, and that such classification is not constitutionally justified by its relationship to any sufficiently important interest of the Commonwealth. It is true that "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." *Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979), quoting *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). It is also true that "classification based on sex is subject to strict judicial scrutiny under the State [Equal Rights Amendment] and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose." *Lowell* v. *Kowalski*, 380 Mass. 663, 666 (1980). But those constitutional principles do not apply in this case because the

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[2] "The mother herself is the proper party to seek a complaint for adjudication of paternity, for expenses of the pregnancy and support of the child." *Baby X* v. *Misiano*, 373 Mass. 265, 265 (1977).

described classifications are not gender-based. Not only mothers, but presumed fathers as well, may initiate proceedings raising the issue of the child's paternity. *Symonds* v. *Symonds*, 385 Mass. 540, 544 (1982).

That the distinction between those who may initiate paternity proceedings and those who may not do so is not based on sex is enough to defeat the plaintiff's argument. Further discussion, however, is appropriate. Even though no gender-based classification has been established, "[e]qual protection of the laws requires. . . .that all persons in the same category and in the same circumstances be treated alike." *Opinion of the Justices*, 332 Mass. 769, 779-780 (1955). That requirement is met here. The plaintiff is not "in the same category and in the same circumstances" as the mother and her husband, the presumed father, who, with the child in question and another child, constitute a family unit. A challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth. When the same challenge is made by someone within the family, the ruptures in the marriage and family, most often, have already taken place, and even when the family is intact, those within the family are in far better position than is an outsider fairly to decide whether the family can survive the challenge presented by litigation of the paternity issue. These considerations justify treating persons outside the family differently from persons within it. *Vincent B.* v. *Joan R.*, *supra* at 627; *Petitioner F.* v. *Respondent R.*, *supra* at 1080; *A.* v. *X, Y, and Z*, *supra* at 1224-1226. But see *R. McG.* v. *J.W.*, 200 Colo. 345, 349-354 (1980).

We conclude that in the circumstances presented by this case a man does not have a constitutional right to an adjudication of whether he is the father of a child conceived while the child's mother was married to another man. Also, because of

the social policy we have discussed above in favor of affording legitimacy to children, whenever possible, and of "strengthening and encourag[ing] family life for the protection and care of children," we conclude that we should not recognize in the plaintiff a common law right to such an adjudication. We express no opinion as to whether the child could, at some point, for the purpose of establishing inheritance rights or for any other purpose, bring an action attempting to prove that the plaintiff is his natural father. We remand the case to the Probate and Family Court with instructions to enter an order dismissing the plaintiff's complaint.

So ordered.

Appendix III.

COMMONWEALTH OF MASSACHUSETTS
PROBATE & FAMILY COURT
MIDDLESEX DIVISION
No. 5170

P B C
v.
D H

MEMORANDUM AND ORDER

This matter came on before the court for hearing on plaintiff's Motion to Compel and for Sanctions, and on defendant's Motion to Dismiss for Failure to State a Claim upon which relief can be Granted and on plaintiff's Motion for Trial Date Certain. Present were the attorney for the plaintiff, Muriel Carpenter; the attorneys for the defendant, Steven Dean and Harley Anderson; and the attorney for the minor child, Malcolm Donahue.

The central issue in the case at this stage concerns the paternity of the minor child, N H . Mr. and Mr. H were divorced by a Judgment of Divorce Nisi dated December 8, 1981 which became final on June 9, 1982. At the time of the divorce, the H's had one (1) child. Mrs. H was three (3) months pregnant with N at the time of the Judgment of Divorce Nisi. It is undisputed that the plaintiff and D H had an intimate relationship which extended over a period of time, the exact time of the beginning and of the end of the relationship is in dispute. Mr. and Mrs.

H were remarried in September, 1983, after the commencement of the current action.

The current action has been before the Trial Court, a Single Justice of the Appeals Court (on two occasions), the full panel of the Appeals Court (which declined to hear the matter), and a Single Justice of the Supreme Judicial Court on the question as to whether all of the parties should be compelled to submit to the HLA Blood Grouping Tests, and on the issue of the appropriate sanctions for failure to submit to the tests. Initially, the Trial Court refused to order the defendant, D H , and the child to submit to the HLA Blood Grouping Tests. Based on the strong showing made in the petitioner's affidavit, which is substantially unrebutted by the defendant and the high degree of accuracy of the HLA Blood Grouping Tests for determining paternity Chief Justice Greaney concluded that it was an abuse of discretion for the trial judge to deny the petitioner's Motion for the test as evidence in the petitioner's pending Probate and Family Court action to establish paternity. Mr. Justice Wilkins of the Supreme Judicial Court declined to exercise jurisdiction under G.L. c. 211, § 3 to vacate the order for blood tests.

Upon remand Associate Justice Coffey of the Middlesex Probate and Family Court ordered all parties to submit to the HLA Blood Grouping Tests. When the defendant, D H , refused to comply Judge Coffey imposed as a sanction the suggestion of Associate Justice Wilkins of the Supreme Judicial Court that she would be taken to have conceded that the tests would not exclude the petitioner's paternity and that the plaintiff would be entitled to show the significance of that concession on a percentage basis. The plaintiff appealed the sanction as being inadequate and the original sanction was sustained by Chief Justice Greaney of the Appeals Court as not constituting an abuse of discretion.

The plaintiff appeared before this Judge on December 19, 1984 seeking to set a trial schedule. Without having any prior

knowledge of the proceedings enumerated above, this court suggested that the HLA Blood Grouping Tests was the most probative evidence on the issue of paternity and suggested that an appropriate motion be filed in order that the court might deal with the issue before establishing a trial date.

In view of the long involvement of Associate Justice Coffey with this case, inquiry was made whether he sought to retain jurisdiction. Counsel informed the court that Associate Justice Coffey was not retaining jurisdiction of this matter and have so stated on the record. The court notes that by a second Motion for custody, visitation and sanctions, the plaintiff, on September 20, 1984 sought among other things to have a finding entered that the plaintiff be declared the natural father of the minor child. The Motion was based on the refusal of the defendant to submit to the HLA Blood Grouping Tests. Associate Justice Coffey denied the Motion "without prejudice to be re-submitted at the time of trial."

This court is now faced with a serious dilemma. The defendant now seeks to have the matter dismissed on the grounds that only the husband and wife have standing to challenge the paternity of a child conceived during coverture. Although this question has not specifically been raised until now, the matter was impliedly considered by Chief Justice Greaney of the Appeals Court in his statement concerning the strong showing made in the petitioner's affidavit. In the petition before Mr. Justice Wilkins under G.L. c. 211, § 3 to vacate the order for the blood tests, Justice Wilkins stated, "It is not argued here that a man in the position of C has no right to have his request for visitation considered, assuming he is found to be the child's father." In view of the prior proceedings in this case involving the propriety of the blood tests, and the showing of the plaintiff in his Affidavit and the undisputed evidence in this case, this court does not believe that a Motion to Dismiss is appropriate at this time. Whatever the merits of the defend-

ant's position can be preserved and, if necessary, argued on appeal after the case has been determined on the merits. To encourage further piecemeal appellate review of this issue under the circumstances of this case would be inappropriate. All parties are entitled to some finality.

With respect to the trial of the case on the merits, this court is concerned with the adequacy of the current sanction for failure to submit to the HLA Blood Grouping Tests. On the one hand, the defendant may have good reason for refusing to take a test which has the possibility of producing highly probatives evidence which could not only illegitimatize her child, but also seriously disrupt her current family situation. On the other hand, the plaintiff has stated a sufficient case so as to pursue his claim seeking to establish paternity. At this point in time when the line between children born in and out of wedlock is nowhere near as strong as it once was, and no one questions that the HLA Blood Grouping Tests has a degree of accuracy far greater than the old exclusionary test, the court is most reluctant to proceed without obtaining the best available evidence. If the test is properly given, no significant physical intrusion of any of the parties is involved. If the test is not taken the court may well be deprived of the most probative available evidence in determining the constitutional rights of all the parties involved.

Another question which arises by the failure to obtain the most probative available evidence concerns the burden of proof. Where a plaintiff seeks to establish a paternity in a situation which would not only illegitimatize a child conceived during coverture, but would also be potentially disruptive of an intact family, the burden of proof may be more than the customary civil standard. Under these circumstances, the results of a properly administered HLA Blood Grouping Tests are even more compelling. The HLA Blood Grouping Tests has the potentiality of affirmatively determining paternity. The

current imposed sanction places the court in the same position it was in with respect to blood grouping tests as existed prior to the HLA Blood Grouping Tests.

In view of all of the above, it is hereby Ordered that:

1. The defendant's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted is denied.

2. The defendant is ordered to appear and produce the minor child, N H , for HLA Blood Grouping Tests within thirty (30) days at a time and a place to be arranged by all counsel. If the defendant has not complied with the order to participate in the HLA Blood Grouping Tests, she shall appear before this court on Tuesday February 12, 1985 at 9:00 a.m. at which point the court will consider, among others, the following sanctions: (a) that the defendant be foreclosed from presenting any evidence of any kind whatsoever, whether in her case, or in rebuttal of the plaintiff's case pertaining to the issue of paternity; (b) that the defendant be incarcerated until she agrees to comply with the order; (c) that the defendant be assessed daily costs until she complies with the order.

3. Associate Justice Edward M. Ginsburg shall retain exclusive jurisdiction over all aspects of this case.

By the Court,

January 2, 1985
Date

s/ EDWARD M. GINSBURG
EDWARD M. GINSBURG
ASSOCIATE JUSTICE

85-1183

No. - .

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

P.B.C.,
PETITIONER,

v.

D.H.,
RESPONDENT.

Response to Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

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Questions Presented.

I. Has Massachusetts properly applied the Equal Protection analysis in its protection of the fundamental constitutional rights of a mother, her husband, and their children?

II. Did Massachusetts properly apply due process analysis in dismissing the petitioner's complaint for his failure to show any cognizable interest?

III. Has the State properly applied the requirements of due process analysis as delineated by *Board of Regents* v. *Roth*?

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No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1985.

P.B.C.,
PETITIONER,

v.

D.H.,
RESPONDENT.

Response to Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

Opinion Below.

The opinion of the Massachusetts Supreme Judicial Court, which the petitioner attempts to challenge, is reported at 396 Mass. 68 (1985) and appears in the Appendix hereto at 1a.

Statement of the Case.

The above-captioned matter was a case of first impression in Massachusetts wherein a male was seeking to bastardize the legitimate child of a married couple and thereby to establish a claim of paternity to one of the couple's children. The child, N.H., is the legitimate child of D.H. and W.H. according to Massachusetts statutes and rulings delineated for the Massachusetts Supreme Judicial Court. As the Supreme Judicial Court recognized, petitioner fails to cite one authority from any jurisdiction in the United States, granting him standing to bastardize a legitimate child. Further, the court also recognized the strong need to protect the fundamental constitutional rights of a mother, her husband, and their family.

In September 1983, P.B.C. filed a complaint in the Massachusetts Probate Court to establish a claim of paternity. The parties engaged in various discovery efforts, including petitioner's efforts to obtain the administration of HLA Blood-Grouping Tests. The petitioner received a lower court order for such blood-grouping tests, including an order to incarcerate the respondent-mother, and an order for monetary penalties against the respondent.

In December 1984, respondent filed a motion to dismiss for lack of standing, for failure to state a claim upon which relief can be granted per Mass.R.Civ.P. 12(B)(6) and for lack of subject matter jurisdiction. D.H.'s motion to dismiss surveyed the authorities in Massachusetts and throughout the United States outlining P.B.C.'s failure to present any authority establishing his right to challenge the legitimacy of the child.

The respondent's motion to dismiss was denied by a probate court justice in January 1985. Respondent appealed to the Massachusetts Appeals Court which certified the matter for interlocutory review by a full panel of said court.

Subsequently, the Massachusetts Supreme Judicial Court ordered a direct appellate review on its own initiative. After consideration of written briefs and oral arguments, the Massachusetts Supreme Judicial Court ruled that the petitioner had no standing for an adjudication whether he is the father of a child conceived while the child's mother was married to another man. The Massachusetts Court ruled that while the presumption of legitimacy may be rebutted by a child's mother, his presumed father, and the child himself/herself, a stranger to the family relationship had no standing to encroach upon the family's fundamental Constitutional rights by bringing an action to establish a claim of paternity.

Statement of Facts.

The undisputed facts, submitted by the parties and recognized by the Massachusetts Court are as follows:

While the mother was married to W.H., the mother and the petitioner had a sexual relationship for a period of time, ending in July/August 1981 (App. 11a-12a). The mother also experienced marital difficulties, filing a complaint for divorce in May 1981. The child was conceived in September of 1981, when the mother had reconciled with her husband. A judgment of divorce nisi was granted by the Massachusetts Probate Court and the decree became final, automatically, on June 9, 1982. The child was born the next day.

The child was immediately acknowledged as the offspring of D.H. and her husband, W.H. The child's birth certificate lists the respondent's husband as the father and the husband has consistently acknowledged his paternity.

During the following fifteen months, through the commencement of this action, the child lived with the mother and with

her former husband, the acknowledged father. The child never lived with the plaintiff.

The complaint was filed on September 6, 1983. Since that date, the mother, D.H., her former husband, W.H., have remarried, and have lived continuously together with their children as a family (App. 10a, 12a).

During eighteen months of probate court hearings, the petitioner never presented any evidence to support the allegations contained in his own complaint and his unverified affidavit. The respondent and her husband presented various indicia of their relationship with the child, including birth certificate, medical records, and affidavits.

Reasons for Denial of the Petition for Certiorari.

I. The petitioner fails to present any novel question of constitutional rights in his challenge to state court decisions which were based upon established analyses of United States Supreme Court decisions. The United States Supreme Court has previously denied certiorari in two similar efforts to appeal. *A* v. *X, Y and Z,* 641 P.2d 1222, *cert. den.,* 74 L.Ed.2d 518, 103 S. Ct. 388 (Wyo. 1982); *In Re Lisa R,* 13 Cal.3d 636 (1975), *cert. den.,* 421 U.S. 1014, *reh. den.,* 423 U.S. 885 (1975).

A. The Massachusetts Supreme Judicial Court properly applied due process analysis, finding that petitioner failed to demonstrate a cognizable interest pursuant to the analysis of the United States Supreme Court, or any state court. Massachusetts also properly applied due process analysis in recognizing the substantial fundamental constitutional rights of the mother, her husband, and their family.

The Massachusetts Supreme Judicial Court, in this case, expressly confirmed the existence of a rebuttable presumption of legitimacy in cases where a child was conceived during wed-

lock and where the child was acknowledged by a male. This presumption may be rebutted by a class of individuals who are male and female. Specifically, the mother, the presumed father, and the child all have standing to dispute the child's paternity. In this particular case, the child was conceived during wedlock, and the parents, though technically divorced, consistently acknowledged the child as their own since its birth and have remarried.

The petitioner, P.B.C., presented a fallacious argument to the Massachusetts Supreme Judicial Court and he presents the same argument to this United States Supreme Court. Specifically, petitioner asks the Court to *assume* that which he seeks to ultimately *prove*. He asks the Court to assume his paternity, and subsequently to grant him standing to attempt to prove his paternity to a child which is already recognized as the legitimate offspring of a married couple.

Failing to present any constitutional, statutory, or common law authority to support his argument, petitioner attempts to derive a right of standing from the holding and implications of *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and related cases. In *Stanley*, the petitioner was an unwed male who was the *undisputed* biological father of a decedent's children. A state law deprived the father of custody without any hearing on parental fitness or proof of neglect. The United States Supreme Court held that the undisputed father was deprived of due process and equal protection of the laws. 405 U.S. at 647-658.

It is most significant to note that *Stanley* v. *Illinois* was a *custody* case. *Paternity* and standing to bring an action regarding paternity were *not* at issue. Paternity was *undisputed*. *Stanley* provides no authority for any court to assume paternity and subsequently allow one to attempt to establish a claim of paternity.

Indeed, *Stanley* very carefully and explicitly enunciates the substantial fundamental Constitutional rights of a true father,

and of the family unit. As the court stated, "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . the Equal Protection Clause of the Fourteenth Amendment . . . and the Ninth Amendment . .." 405 U.S. at 651.

> [O]rdinarily an unwed father has a legally protectable interest in his children, and . . . he is entitled to establish that he is their natural father. But it does not follow, and *Stanley* v. *Illinois*, . . . does not require, that, in all circumstances, a man claiming to be the father of a child conceived while the child's mother is married to another man is constitutionally entitled to be heard on the question of paternity.
>
> As the plaintiff recognizes in his brief, "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934). The Commonwealth has legitimate and strong interests in "the strengthening and encouragement of family life for the protection and care of children," G.L. c. 119 § 1 (1984 ed.), and in affording legitimacy to children. *Powers* v. *Steele*, 394 Mass. 306, 310 (1985). Denying a plaintiff the right to establish his paternity in the circumstances of this case promotes these interests. . . . See *Vincent B.* v. *Joan R.*, 126 Cal.App.3d 619, 624-627 (1981); *Petitioner F.* v. *Respondent R.*, 430 A.2d 1075, 1078-1079 (Del. 1981); *A.* v. *X, Y and Z*, 641 P.2d 1222, 1226-1227 [cert. den., 74 L.Ed.2d 518, 103 S.Ct. 388] (Wyo. 1982).

(App. 6a-7a.)

As the petitioner concedes, this Court has recognized the constitutionally protected interests of a father in maintaining his parental relationship with his child. See *Lehr* v. *Robertson*, 463 U.S. 248 (1983); *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977); *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Petitioner fails to recognize that he is seeking to intrude upon a previously-established constitutionally protected, father-child relationship which is enjoyed by the respondent's husband and the child. Indeed, petitioner fails to justify his position with the decisions of the United States Supreme Court and virtually all state courts which protect the fundamental constitutional rights of women and men as parents, and families as a unit. *Moore* v. *East Cleveland*, 431 U.S. 494 (1977); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Taylor* v. *Richardson*, 354 F. Supp. 13 (1973 D.C. applying Cal. law); *State* v. *Fury*, 53 N.D. 333, 205 N.W. 977 (1925); *Deatherage* v. *Phipps*, 441 P.2d 1020 (Okla. 1967); *Re Kessler's Estate*, 76 S.D. 158, 74 N.W.2d 599 (1956); *Dorsey* v. *Williamstown*, 170 So.2d 773 (La. App. 1967); *Brugman* v. *Prejean*, 288 So.2d 702 (La. App. 1974); *Speight* v. *Wheeler*, 310 So.2d 716 (Miss. 1974); *Ventresco* v. *Bushey*, 159 Me. 241, 191 A.2d 104 (1963); *Anonymous* v. *Anonymous*, 43 Misc.2d 1050, 252 N.Y. S.W.2d 797 (1964); *Commonwealth ex rel. Weston* v. *Weston*, 201 Pa. Super. 554, 193 A.2d 782 (1963); *Re Adoption of Young*, 469 Pa. 141, 364 A.2d 1307 (1976); *Knaver* v. *Barnett*, 360 So.2d 399 (Fla. 1978); *Perkins* v. *Perkins*, 34 Conn. Supp. 187, 383 A.2d 634 (1977) (based on "long-standing policy favoring the legitimacy and best interests of children");

Hudson v. *Hudson*, 151 Neb. 210, 36 N.W.2d 851 (1949); *Lynn* v. *State*, 47 Ohio App. 158, 191 N.E. 100 (1934); *Tracy* v. *Baker*, 282 F.2d 431 (9th Cir. 1960); *P* v. *P*, 86 Misc.2d 844, 383 N.Y.S.2d 1014 (1976).

B. The analysis in this case and in all four states considering similar claims, correctly applied the requirements of due process analysis as explicated by *Board of Regents* v. *Roth*.

As set forth in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), the Court must look to the nature of interests presented and subsequently weigh the competing interests to determine entitlement to due process and the nature of due process.

This analysis was appropriately applied by the Massachusetts Supreme Judicial Court in this case, as it was correctly applied in each instance by state supreme courts, considering claims of previously unacknowledging males seeking standing to adjudicate paternity claims. See *P.B.C.* v. *D.H.*, 396 Mass. 68 (1985); *A* v. *X, Y and Z*, 641 P.2d 1222, *cert. den.*, 74 L.Ed.2d 518, 103 S. Ct. 388 (Wyo. 1982); *Vincent B.* v. *Joan R.*, 126 Cal.App.3d 619, 624-627 (1981); *Petitioner F* v. *Respondent R.*, 430 A.2d 1075, 1078-1079 (Del. 1981). Indeed, Massachusetts considered the nature of the interests involved, and, second, it assumed, for sake of argument, that the petitioner did have a cognizable interest. Even with that assumption, the Supreme Judicial Court recognized that the possible interest of the petitioner was strongly outweighed by the interests of the mother and her right to family privacy, the interests of the presumed father and his relationship to the child, the Commonwealth's interest in promoting the strength of family life for the protection and care of children, and the family's right to privacy (App. 8a-9a).

Petitioner's argument fails in that he is looking to go beyond the analysis of *Roth*. Whereas *Roth* directs the Court to consider the nature of the interests involved, the petitioner in this in-

stance, is asking the Court to *assume*, or *hypothesize* some relationship between the petitioner and the child. Such argument defies all appropriate due process analysis and the related social policy concerns.

II. Massachusetts has appropriately recognized a classification protecting the rights of mothers, presumed fathers, and children against attack by strangers to the family relationship.

The Massachusetts Supreme Judicial Court considered the equal protection arguments of the plaintiff and dismissed them, finding that this Commonwealth position recognizes the standing of a class which cannot be described as gender exclusive. In Massachusetts, as in most other states, the paternity of the child can be challenged by mothers, presumed fathers, and by the child himself/herself. The court determined this reality to be sufficient to defeat the petitioner's argument (App. 7a-8a).

The Massachusetts Court went further to consider the treatment of persons who may be in like circumstances. The court found that the petitioner is not in the same category and in the same circumstance as the mother and her husband, the presumed father, who, with the child in question and another child, constitute a family unit. The court stated:

> A challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth. When the same challenge is made by someone within the family, the ruptures in the marriage and the family, most often, have already taken place, and even when the family is intact, those within the family are in far better position than is an outsider fairly to decide whether the family can survive the challenge presented by litigation of the paternity issue. These con-

> siderations justify treating persons outside the family differently from persons within it.

(App. 8a.)

The classification which Massachusetts has recognized is not gender based and it clearly bears a substantial relation to the important governmental objective of protecting the constitutional rights of mothers, fathers, and family relationships. The petitioner is without a claim of gender-based discrimination.

Conclusion.

The petitioner's application for a writ of certiorari to the Supreme Judicial Court of Massachusetts must be denied. Petitioner has failed to raise any question of due process and he has failed to raise any question as to the propriety of the Massachusetts Equal Protection Analysis. Clearly, there has been no gender-based classification imposed by the court of this Commonwealth. Clearly, the four states which have considered this issue, have appropriately employed the due process analytical framework set forth by the United States Supreme Court. Petitioner's attempt to hypothesize his paternity and therefore seek standing to establish his paternity is a blatant

fallacy and must be dismissed. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix I.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

P.B.C. *vs.* D.H.
Middlesex, May 8, 1985.—October 10, 1985.
Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & O'CONNOR, JJ.

CIVIL ACTION commenced in the Middlesex Division of the Probate and Family Court Department on September 6, 1983.

A pretrial motion was heard by *Edward M. Ginsburg*, J.

Leave to file an interlocutory appeal was granted in the Appeals Court by *John M. Greaney*, C.J.

The Supreme Judicial Court ordered direct appellate review on its own initiative.

Steven I. Dean for the defendant.

Malcolm M. Donahue for the minor.

Muriel N. Carpenter for the plaintiff.

O'CONNOR, J. The plaintiff in this case contends that he has a right to an adjudication of whether he is the father of a child conceived while the child's mother, the defendant, was married to another man. We hold that in the circumstances of this case he has no such right.

The complaint, filed in the Probate and Family Court, requests that the court declare the plaintiff to be the natural father of the child and that he be granted custody of the child, or, if not custody, then visitation rights. The plaintiff moved that the court order that he, the mother, and the child submit to a

Human Leukocyte Antigen (HLA) white blood cell test. A judge denied the motion. Thereafter, there were proceedings in the Appeals Court and before a single justice of this court, as well as further proceedings in the trial court, resulting in the allowance of the plaintiff's motion and an order that the plaintiff, the mother, and the child submit to the test on a specified date.

When the mother and the child failed to submit to the test, a judge of the trial court imposed sanctions by ordering that the mother would be deemed to have made certain concessions favorable to the plaintiff's claim. The plaintiff then moved that the case be scheduled for trial, but, before a trial date was assigned, the mother moved to dismiss the complaint on the ground that the plaintiff lacked standing to litigate the question of his paternity. Taking into account the earlier proceedings relative to the blood test, an affidavit that had been filed by the plaintiff, and certain "undisputed evidence," a judge concluded that allowance of the motion to dismiss at that time was inappropriate, and he denied the motion. At the same time, he ordered the mother and the child to submit to the HLA test. The order provided that the possible consequences of noncompliance would be preclusion of the mother from offering evidence at trial on the issue of paternity, incarceration until she complied with the order, and assessment of "daily costs" against her.

The next procedural step was that the mother filed in the Appeals Court a petition for review of the denial of her motion to dismiss the complaint. A single justice of that court reasoned that if the test were administered and showed that the plaintiff was the child's natural father, and if then, on appeal, it was decided that the plaintiff had no standing to assert his paternity, serious and longlasting emotional damage might unnecessarily be caused to the child. Accordingly the single justice authorized an interlocutory appeal to the Appeals Court from the denial

of the mother's motion to dismiss the complaint, and he ordered a stay of further proceedings in the trial court. We transferred the case to this court on our own initiative. We remand the case to the Probate and Family Court for the entry of an order dismissing the complaint.

The trial judge and the single justice of the Appeals Court relied on matters outside the pleadings in making their rulings. The parties, too, in their briefs on appeal, rely on facts not pleaded. Therefore, we treat the motion to dismiss as a motion for summary judgment, and we consider the facts to be those expressly or impliedly set forth in the pleadings, affidavits, and briefs of the parties, and about which there appears to be no controversy.

Those facts are as follows. For an extended period of time before September, 1981, while the mother was married to another man, the mother and the plaintiff had a sexual relationship.[1] The mother filed a complaint for divorce in May, 1981. The child was conceived the following September. A judgment of divorce nisi was entered on December 8, 1981. The divorce became final on June 9, 1982, and the child was born the next day. The child has lived with the mother since birth and has never lived with the plaintiff. Since September, 1983, the mother has not allowed the plaintiff access to the child. The complaint in this case was filed on September 6, 1983, and after that the mother and her former husband remarried.

By affidavit and in her brief the mother asserts other facts which the plaintiff appears to concede. Those facts are that her remarriage to her former husband occurred on September 12, 1983, the child's birth certificate lists her husband as the

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[1] The parties dispute whether their sexual relationship continued into September, October, and November, 1981. They also dispute the extent to which the mother and her husband lived together between late 1981 and the summer of 1983. We make no assumptions as to those facts or other facts in controversy. Resolution of the controverted facts would not affect our decision.

father, the husband has never denied his paternity, and since September, 1983, the mother, her husband, the child in question, and an older child of the mother and her husband have lived together continuously. We make those assumptions.

This court has held that a child *born* to a married woman is presumed to be the child of the mother's husband. *Commonwealth* v. *Leary*, 345 Mass. 59, 60 (1962). That presumption of legitimacy may not be rebutted, even in a civil case, "except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father." *Phillips* v. *Allen*, 2 Allen 453, 454 (1861). We hold today that a child *conceived* by a married woman is presumed to be the child of the man to whom the mother was then married even if the mother and the husband are divorced at the time of the child's birth. Our holding fosters the important social policy of affording legitimacy to children whenever possible. See *Powers* v. *Steele*, 394 Mass. 306, 310 (1985); *Green* v. *Kelley*, 228 Mass. 602, 605 (1917). The plaintiff has not urged us to hold otherwise. He simply argues that he should be permitted to rebut that presumption.

Here, the mother was married at the time the child was conceived. The child, therefore, is presumed to be the husband's child. Although we have held that the presumption of legitimacy may be rebutted, and we have defined the burden of proof in that regard, we have never confronted the question whether the presumption may be rebutted by a man claiming to be the child's natural father. Nor does any statute answer the question.

The question was not before us in *Normand* v. *Barkei*, 385 Mass. 851, 853 (1982), on which the plaintiff relies as support for his contention that he has a right to prove that he is the child's father. *Normand* v. *Barkei*, *supra*, sheds little light on the issue before us because in that case the children's mother was unmarried when the children were conceived and were

born. There was no question of legitimacy. The plaintiff simply sought an order granting him visitation rights with respect to two children unquestionably illegitimate, that he claimed were his children.

We must decide for the first time, then, whether, in the circumstances of this case, a man is constitutionally entitled to a judicial determination of whether he is the natural father of a child conceived while the mother was married to another man. We conclude that he does not have that constitutional right. We further conclude, as a matter of public policy, that in the circumstances of this case we should not recognize in the plaintiff a common law right to a paternity adjudication.

The plaintiff contends that denying him the opportunity to establish his paternity would deprive him of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. He relies on *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In that case, the Supreme Court stated, "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id* at 651. An understanding of the meaning and limits of that statement is aided by an appreciation of the context in which the statement was made. *Stanley* involved an *acknowledged* father's efforts to prevent his children from being declared wards of the State upon the death of their mother with whom Stanley had intermittently lived for eighteen years. At the time of the conception and birth of the children, the mother was unmarried, as was Stanley. Unlike this case, no presumption of legitimacy was involved. An Illinois statute, conclusively presuming that a father of an illegitimate child is an unfit parent, provided that upon the mother's death the child would automatically become a ward of the State. Focusing on the "cognizable and substantial" interest of a man in the children "he has sired and raised," the Supreme Court held that the conclusive presumption deny-

ing Stanley a right to be heard on his fitness as a parent violated Stanley's right to due process. *Id.* at 649-652.

We continue to recognize, as we did in *Normand* v. *Barkei, supra,* that ordinarily an unwed father has a legally protectable interest in his children, and that he is entitled to establish that he is their natural father. But it does not follow, and *Stanley* v. *Illinois, supra,* does not require, that, in all circumstances, a man claiming to be the father of a child conceived while the child's mother is married to another man is constitutionally entitled to be heard on the question of paternity.

As the plaintiff recognizes in his brief, "the guaranty of due process. . .demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U.S. 502, 525 (1934). The Commonwealth has legitimate and strong interests in "the strengthening and encouragement of family life for the protection and care of children." G.L. c. 119, § 1 (1984 ed.), and in affording legitimacy to children. *Powers* v. *Steele,* 394 Mass. 306, 310 (1985). Denying a plaintiff the right to establish his paternity in the circumstances of this case promotes those interests. Not only was the child's mother married to a man other than the plaintiff when the child was conceived, but also the husband (the presumed father) has never denied that he is the child's natural father. Furthermore, the child's mother and the presumed father have been remarried almost since the filing of the complaint herein, and, since that time, they have continued to maintain a family unit which includes the child. Although appropriate social policy might be clearer if the marriage had been uninterrupted since the child was conceived, we are satisfied that, in the circumstances obtaining here, denying the plaintiff a right to litigate his paternity bears a substantial relationship to the aforementioned interests of the Commonwealth, and, therefore, does not violate the plaintiff's

right to due process. Here, unlike in *Stanley* v. *Illinois, supra,* there is a "powerful countervailing interest" that justifies withholding the relief the plaintiff seeks. Our holding finds support in other jurisdictions. See *Vincent B.* v. *Joan R.,* 126 Cal. App.3d 619, 624-627 (1981); *Petitioner F.* v. *Respondent R.,* 430 A.2d 1075, 1078-1079 (Del. 1981); *A.* v. *X, Y, and Z,* 641 P.2d 1222, 1226-1227 (Wyo. 1982).

The plaintiff's constitutional argument is not limited to the due process clause of the Fourteenth Amendment. He relies also on the Fourteenth Amendment's equal protection clause and on art. 106 of the Amendments to the Constitution of the Commonwealth (the Equal Rights Amendment). The plaintiff's sole argument regarding these constitutional provisions is that to deny him the right to seek an adjudication of his paternity while allowing the child's mother to do so[2] is to establish classifications based on sex, and that such classification is not constitutionally justified by its relationship to any sufficiently important interest of the Commonwealth. It is true that "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." *Caban* v. *Mohammed,* 441 U.S. 380, 388 (1979), quoting *Craig* v. *Boren,* 429 U.S. 190, 197 (1976). It is also true that "classification based on sex is subject to strict judicial scrutiny under the State [Equal Rights Amendment] and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose." *Lowell* v. *Kowalski,* 380 Mass. 663, 666 (1980). But those constitutional principles do not apply in this case because the

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[2] "The mother herself is the proper party to seek a complaint for adjudication of paternity, for expenses of the pregnancy and support of the child." *Baby X* v. *Misiano,* 373 Mass. 265, 265 (1977).

described classifications are not gender-based. Not only mothers, but presumed fathers as well, may initiate proceedings raising the issue of the child's paternity. *Symonds* v. *Symonds*, 385 Mass. 540, 544 (1982).

That the distinction between those who may initiate paternity proceedings and those who may not do so is not based on sex is enough to defeat the plaintiff's argument. Further discussion, however, is appropriate. Even though no gender-based classification has been established, "[e]qual protection of the laws requires. . . .that all persons in the same category and in the same circumstances be treated alike." *Opinion of the Justices*, 332 Mass. 769, 779-780 (1955). That requirement is met here. The plaintiff is not "in the same category and in the same circumstances" as the mother and her husband, the presumed father, who, with the child in question and another child, constitute a family unit. A challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth. When the same challenge is made by someone within the family, the ruptures in the marriage and family, most often, have already taken place, and even when the family is intact, those within the family are in far better position than is an outsider fairly to decide whether the family can survive the challenge presented by litigation of the paternity issue. These considerations justify treating persons outside the family differently from persons within it. *Vincent B.* v. *Joan R.*, *supra* at 627; *Petitioner F.* v. *Respondent R.*, *supra* at 1080; *A.* v. *X, Y, and Z, supra* at 1224-1226. But see *R. McG.* v. *J.W.*, 200 Colo. 345, 349-354 (1980).

We conclude that in the circumstances presented by this case a man does not have a constitutional right to an adjudication of whether he is the father of a child conceived while the child's mother was married to another man. Also, because of

the social policy we have discussed above in favor of affording legitimacy to children, whenever possible, and of "strengthening and encourag[ing] family life for the protection and care of children," we conclude that we should not recognize in the plaintiff a common law right to such an adjudication. We express no opinion as to whether the child could, at some point, for the purpose of establishing inheritance rights or for any other purpose, bring an action attempting to prove that the plaintiff is his natural father. We remand the case to the Probate and Family Court with instructions to enter an order dismissing the plaintiff's complaint.

So ordered.

Appendix II.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. PROBATE COURT
DOCKET NO. 5170

D.H.,
Petitioner

VS. AFFIDAVIT OF THE PETITIONER D.H.

P.B.C.,
Respondent

I, D.H., hereby affirm that the following facts are true to the best of my knowledge and belief:

1. In September, 1972, I met W H at College in , Massachusetts, where we were both students.
2. In May, 1974, W H graduated from College and I shortly thereafter, in September, 1974, began nursing school at the School of Nursing.
3. W H and I were married in March, 1975 and we moved into an apartment at Street in , Massachusetts.
4. On November 17, 1977, W H and I had our first child, .
5. In July, 1978, W H began a full-time graduate program at University. I began working full-time as a nurse to help support our family.
8. In January, 1979, I began working at a new job as a nurse at the Hospital in , Massachusetts.
7. In July, 1979, I was transferred to the emergency department of the Hospital.

8. In August, 1979, I was introduced to P B C who was a supervising physician in the emergency room at the Hospital.

9. Late in 1979 and early in 1980, P B C and I became friends. He made repeated efforts to develop a romantic relationship; however, I refused his repeated offers. We did become friends, and during that period he began to tell me many details about his divorce. In March, 1980, while W H and I were having disagreements, P B C encouraged me to see , a social worker who had counselled with P B C during his divorce. P B C told me that he thought could help me to work through my disagreements with my husband W H, whether that meant separation or reconciliation. Also, in March, 1980, P B C strongly encouraged me to see Attorney who had counselled P B C through his divorce. P B C stated at that time that if I did not take some sort of legal action, and my disagreements with W H continued, that W H might remove our child from the area. I did see P B C's attorney, , and was informed that I did not need to take any legal action.

10. In May, 1980, after five years of marriage, W H and I separated. W H continued his studies at University and began working full time at the School, while I continued in my capacity as a nurse at the Hospital. W H and I continued to maintain contact and to mutually care for our daughter, .

11. In July, 1980, while W H and I were separated, I entered into a physical relationship with P B C. He had made many attempts to start one earlier, but I had refused. During this time, he enlisted my help with his children from a previous marriage who were in the custody of his ex-wife, . During this time, I did help with his children by visiting them, and became friends with his children. At the same time I was continuing with my husband, W H, to mutually care for our daughter, .

12. In February, 1981, my husband, W H, discontinued his studies at University to take on a second job. He began giving me additional money to help support our daughter, . W H and I continued to meet very regularly to do things as a family with our daughter, .

13. In May, 1981, W H and I had an argument about his being late picking up for an overnight stay. P B C, at that point, urged me to leave at P B C's house while I met W H, "to teach him a lesson." P B C had been encouraging me for over a year to obtain a divorce from my husband, W H, and on this night in May, 1981, P B C again urged me to see his attorney, , once again to obtain a restraining order against W H and to take action toward a divorce. The next morning I met with attorney , an associate of attorney . Attorney stated that in addition to obtaining a restraining order it would be advantageous to file for a divorce. That afternoon, attorney and I appeared in Cambridge to obtain a restraining order and to file for a divorce, upon P B C's urging.

14. In August, 1981, my husband W H and I began a process of reconciliation. In that same month of August, I terminated my relationship with P B C, never having relations with him again. Late one weekend in August, my daughter, and I spent a weekend camping in Salisbury with my husband, W H, and W H and I resumed all aspects of our marriage relationship.

15. In September, 1981, W H and I began staying together on a regular basis, and continued to have relations which we had resumed in August, 1981. On September 5, 1981, he took me out for my birthday and we spent that night together. It was on that night that we believe our son, , was conceived.

16. In November, 1981, I told my husband W H that I was pregnant, and we decided that we should live together and, after making arrangements, W H moved in with me in December, 1981.

17. During this period, W H and I discussed whether to let the divorce proceedings continue or whether to terminate the divorce proceedings. We decided to let the divorce go through because we thought it would be much easier to simply let the proceedings continue and get remarried, rather than to stop the proceedings through our attorneys. It had been a very stressful period of time since I had filed for a divorce at P B C's urging, and W H and I did not wish to have any more involvement with the legal proceedings or with P B C.

18. In January, 1982, P B C called me, begged me to meet him, and asked me to meet him at a Howard Johnson's restaurant to talk. I met with him at the restaurant and told him that W H and I were living together again, that our relationship was well, and that I was happy, and that I did not want to see P B C again. During this period of time, I was continuing to have contact with P B C's daughter, , whom I had befriended in the previous year. However, I never, during my conversations with , asked to meet P B C, and never asked if I could meet her at P B C's house.

19. On June 9, 1982, the divorce decree between W H and I became absolute. At the time, W H and I were living together as husband and wife, holding ourselves out as a family unit with our daughter, . At the time, we were not aware that the divorce decree had become absolute.

20. On June 10, 1982, our child, N H, was born. His birth certificate lists my husband, W H and myself, as the parents. At the time of N H's birth, W H acknowledged N H as his child, we acknowledged ourselves as the parents of N H, and continued to live together as a family.

21. In August, 1982, P B C's daughter, , invited me for a visit. While I was there, P B C came home and stated that he was forty-one years old, and he wanted to die. When I asked him why, he refused to discuss it. He also asked if N H was his child, and I told him no. He stated that he didn't think

he was. P B C stated he loved me, missed me, and began pressuring me to see him again. I did not want that, as W H and I were living together again, and had resumed our family relationship. P B C continued to pressure me, however, and I became confused. At the time, I was experiencing post-partum depression and, as a result of the additional pressure applied by P B C, I began to see the only social worker with whom I had any prior experience, , whom I had met two years previous through P B C. After several sessions with , I refused to attend any further sessions because I felt both and P B C were encouraging me to resume my relationship with P B C. I did not want to continue that relationship, I loved W H. did not appear sensitive to my feelings, and seemed to be aligning herself with P B C; therefore, I discontinued counselling sessions.

During this time, in August, 1982, P B C became concerned about any possibility that he was N H's biological father. He did not want anyone to know about our previous relationship, and did not want anything to do with N H. He made me promise that I would never sue him for paternity. He never once mentioned having blood tests done. I never asked him for child support. There were no planned visits between N H and P B C. P B C did see N H on occasion when I was visiting P B C's children with whom I did have a good relationship; however, such occasions were rare, and I never intended nor wanted N H to have any exposure to P B C for various reasons.

22. P B C's efforts to draw me away from my husband, W H, and to interfere with our family relationship continued throught [*sic*] the spring of 1983. During that period, W H and I decided that we would move out of as we were looking for additional living space as a family, and we wished to find what we thought would be a better school system for our daughter, , who was about to enter first grade in September. I wanted to live in because of the quality

of the school system, and also because W H and I attended church at in . W H felt that was too far away for his business. W H and I were unable to come to any agreement regarding a town, and, I therefore, had decided that I would attempt to rent an apartment in hoping that W H would find it to be a desirable area and a convenient are, [*sic*] and therefore, change his mind about buying a house there.

23. During this period of time, in the spring of 1983, P B C upon hearing that I was looking for a place to live, offered to take me to a realtor in who was a friend of his, and who had sold him a house in the past. That realtor, Realty, suggested that P B C buy a house as an investment, and rent me the house or a portion of it. P B C purchased a house in , with plans of converting it into an illegal two-family house, and agreed to rent me that house for $650.00 per month.

24. In June, 1983, I moved into the house in . W H helped me to move into the house. While W H and I disagreed as to where we ought to be living, we continued to work on provided [*sic*] a family home environment for the children. W H, at that time, continued to provide financial support for both our children, and W H also stayed at the house very frequently.

During the initial month I was living in , P B C attempted to intrude upon my family relationships, and attempted to exercise some control over me as my landlord. P B C would drive by the apartment late at night, complain to me later about W H and I continuing to live together, and attempt through various means to have access to my children, and N H. W H and I avoided these efforts by P B C, wanting to protect our children, and N H, from contact with P B C. We did have a close relationship with P B C's daughter , and she continued to baby-sit for and N H. Infrequently, would request to baby-sit at her own house for her convenience,

so I brought a crib and a portable high chair, which W H and I had purchased for N H, over to 's house for her to use in caring for N H along with toys for both children. This continued until moved back with her mother.

25. After living in for approximately one month, I realized that I had made a mistake, and that W H was not going to change his mind about locating permanently in . W H and I began to discuss the possibility of buying a house in another town, specifically, , and in late July began looking for a house in that town. At that point, P B C became concerned about my intention to move away from , and P B C asked me to refrain from paying him the agreed upon $650.00 per month rent, stating that he would deduct it from the $2,000.00 I had loaned him to purchase the house. P B C also became much more persistent in his efforts to interfere with the family relationship that W H and I were enjoying.

26. In August, 1983, W H and I went on a vacation together. We had made our decision to relocate, and we had also decided to remarry in the fall.

27. Two weeks later, P B C filed a lawsuit against me and served me with restraining orders. I immediately moved back to with W H and our children, intending to remain there until W H and I were able to purchase a house in .

28. On September 12, 1983, W H and I remarried.

29. On November 10, 1983, we purchased a two family house in .

30. W H and I have had a very good, solid, loving and caring relationship both during our previous marriage and since our reconciliation in August, 1981. Our relationship and our family relationship has especially flourished since our remarriage in September, 1983 and our move to . Our marriage has never been stronger. We would like to have

another child, but feel we should wait until the Court proceedings in this case have been resolved.

This Court case has taken a great toll on us, emotionally and financially. I believe that P B C has taken this action out of revenge and malice as demonstrated by his actions and as demonstrated by the fact that he never acknowledged N H as his child or attempted to assert any claim to paternity for over fifteen (15) months following N H's birth. He only began to assert any claims to paternity after he realized that W H and I were going to remarry in September, 1983.

Signed under the Pains and Penalties of Perjury, this 13th day of July, 1984.

/s/_____

D.H.